Supreme Court, U.S.
FILED

No. 091118 MAR 15 2010

OFFICE OF THE CLERK

In The Supreme Court of the United States

CURIOUS THEATRE COMPANY,
a Colorado non-profit corporation, and
PARAGON THEATRE,
a Colorado non-profit corporation,

Petitioners,

v.

COLORADO DEPARTMENT
OF PUBLIC HEALTH AND ENVIRONMENT,
and JAMES MARTIN, its executive director,

Respondents.

On Petition For A Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Colorado Clean Indoor Air Act, which bans the smoking of any "plant matter" in most indoor facilities open to the public, violate the First Amendment as applied to smoking of tobacco-free alternative cigarettes by performers during live theatrical productions?

2. When a State enacts a criminal law that completely bans a mode of protected artistic expression, does the State bear *any* burden of proof to establish narrow tailoring, or can the State justify the ban on mere esthetic grounds?

RULE 29.6 STATEMENT

Petitioners have no parent companies and no public companies holding 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Curious Theatre Company and Paragon Theatre ask this Court to issue a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (App. 1-41) is reported at 220 P.3d 544. The opinion of the Colorado Court of Appeals (App. 42-72) is reported at 216 P.3d 71. While the District Court for the City and County of Denver issued its decision orally, it is discussed in both Colorado appellate opinions. (App. 5, 44-45).

JURISDICTION

The Colorado Supreme Court issued its judgment on December 14, 2009. Neither party sought rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The Colorado Supreme Court's opinion affirmed the denial of a preliminary injunction and effectively ended the case since Petitioners' only basis for injunctive relief was that the smoking ban violated Petitioners' free speech rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Speech Clause in the First Amendment of the Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. The Free Speech Clause applies to Colorado via the Due Process Clause of the Fourteenth Amendment of the Constitution. U.S. CONST. amend. XIV sec. 1; *Douglas v. City of Jeannette*, 319 U.S. 157, 162 (1943).

The Colorado Clean Indoor Air Act, C.R.S. § 25-14-201 to -209 (2009), is reproduced *infra* in the Appendix. (App. 73-85).

STATEMENT OF THE CASE

In the past several years, numerous states and cities have passed bans or limits on indoor smoking in order to protect non-smokers from the dangers of second-hand tobacco smoke. Many of these statutes and ordinances contain exceptions for smoking by performers in live theatrical productions, either expressly or by allowing the use of "alternative" cigarettes containing cloves or herbs. *See, e.g.*, D.C. CODE § 7-1708(3) (2009) (allowing smoking "[u]pon the stage by performers during the course of any theatrical performance if smoking is part of the theatrical production"); N.Y.C. ADMIN. CODE § 17-503(a)(8) (2009) ("except that smoking may be part of a theatrical production"); CAL. LAB. CODE § 6404.5(d)(9) (2009)

(ban does not apply to "[t]heatrical production sites, if smoking is an integral part of the story in the theatrical production").

Several states and cities, however, have not only omitted a theatrical exception, but defined "smoking" and/or "tobacco" so broadly as to make the smoking of any substance illegal during a play. *See, e.g.*, NEB. REV. STAT. §§ 71-5726 to -27 (2009) ("[S]moking means the lighting of any cigarette . . . regardless of its composition."); N.J. REV. STAT. §§ 26:3D-57, -59 (2009) ("'Smoking' means the burning of . . . tobacco or any other matter that can be smoked."); MONT. CODE ANN. §§ 50-40-103(8), -104 (2009) ("'Smoking' . . . includes the act of lighting . . . any smokable product."); WASH. REV. CODE § 70.160.020 (2009) ("'[S]moking' means the carrying or smoking of any kind of lighted pipe, cigar, cigarette, or any other lighted smoking equipment."); CHICAGO, ILL. MUN. CODE § 7-32-10, -15 (2009) ("'[S]moking' means the . . . burning . . . of any kind of . . . cigarette, hookah, weed, herb[ ], or any other lighted smoking equipment."); PHILA., PA. CODE § 10-602(2)(f), (3)(a)(0.4) (2009) ("'Smoking' [means] . . . burning . . . any lighted cigarette . . . which contains tobacco or other smoke producing products"); SAN ANTONIO, TX. CODE OF ORDS. § 36-1, -3 (2010) ("Smoking means . . . burning . . . any . . . cigarette, pipe, weed, plant, or other combustible substance in any manner or in any form.").

In 2006, when it passed the Colorado Clean Indoor Air Act, the Colorado legislature specifically rejected an amendment allowing theatrical smoking,

and defined "tobacco" to include "cloves and any other plant matter or product[.]" (App. 77). On December 14, 2009, the Colorado Supreme Court became the first state high court to address the constitutionality of a complete ban on smoking as part of live theatrical presentations. The court, over a vigorous and thorough dissent, upheld the ban as a content-neutral restriction on freedom of expression.

This case presents the Court with the opportunity to clarify the requirements of the fourth prong of its *O'Brien* test as applied to theatrical expression, *i.e.*, the requirement of narrow tailoring. Because the Colorado Clean Indoor Air Act forbids the smoking not only of tobacco but of any other plant matter that can be smoked, performers in Colorado cannot realistically portray smoking as intended by playwrights, both famous and obscure. The Colorado General Assembly could have tailored the Act to allow smoking during theatrical productions by mandating warnings to patrons before they attend a play or by permitting smoking of alternatives like herbal cigarettes. If *O'Brien* does not require such an accommodation of free expression, then virtually any content-neutral legislation is beyond the reach of the First Amendment.

This case also provides the Court with the opportunity to clarify the evidentiary burden imposed on the government with respect to narrow tailoring. Here, the Colorado Supreme Court held that this burden was met, even though no evidence was submitted by the State during the trial court hearing.

Alternatively, the Colorado Supreme Court found that an "esthetic" interest may justify a prohibition on "intrusive and unpleasant formats for expression," such that "the connection between limiting exposure to environmental smoke and banning indoor public smoking in places of public accommodation is apparent without further evidentiary support." (App. 15-16). This unique rationale for upholding a complete ban on theatrical expression is also worthy of this Court's review.

A. The Colorado Clean Indoor Air Act (Colorado's Smoking Ban).

Colorado's smoking ban criminalizes the act of smoking in certain facilities, including all theaters. C.R.S. § 25-14-208(1)-(3) (App. 84). It applies both to persons who smoke in forbidden places and to those who own or manage the facilities in which impermissible smoking occurs. *Id.* Criminal fines accumulate with each violation. *Id.*

One of the most important aspects of Colorado's smoking ban, pertaining to whether it is sufficiently tailored, is its definition of "tobacco." The statute defines "tobacco" to include not only cigarettes, cigars, and other forms of tobacco, but also "cloves and *any other plant matter or product* that is packaged for smoking." C.R.S. § 25-14-203(17) (App. 77) (emphasis added). This wide-ranging definition of tobacco results in a smoking ban that prevents actors engaged in live theatrical productions from smoking anything

that burns, *i.e.*, anything they can light and inhale, whether softly or deeply. The legislative history of the Colorado smoking ban includes a refusal by the Colorado House of Representatives to pass an amendment that would have created an exemption for theatrical productions. (App. 50).

The legislative declaration to the ban states that the general assembly wished to protect the people of Colorado from "involuntary exposure" to tobacco smoke, and also that "a balance should be struck between the health concerns of nonconsumers of tobacco products and the need to minimize unwarranted governmental intrusion into, and regulation of, private spheres of conduct and choice with respect to the use or nonuse of tobacco products in certain designated public areas and in private places." C.R.S. § 25-14-202 (App. 73). The declaration adds that the ban's purpose is "to preserve and improve the health, comfort, and environment of the people of this state by limiting exposure to tobacco smoke." *Id.*

B. Smoking Bans Throughout The United States.

As the Colorado Court of Appeals noted, smoking bans are rapidly appearing throughout the United States.[1] (App. 46-50). In March 2008, the month in

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[1] The Colorado Supreme Court, whose opinion superseded that of the court of appeals, did not survey smoking bans outside Colorado.

which the Colorado Court of Appeals issued its opinion, the court listed 27 states (other than Colorado), plus the District of Columbia, as having some form of a smoking ban. (App. 47-48). Of these, twelve exempt actors participating in live theatrical performances and the owners and operators of such facilities. (App. 49-50). Two years later, as of the filing of this Petition, at least six additional jurisdictions have chosen to enact statewide bans on smoking in nongovernmental facilities. *See* IOWA CODE §§ 142D.1 to -9 (2010); MICH. COMPL. LAWS §§ 33.12601-17 (2010); NEB. REV. STAT. §§ 71-5717 to -5734 (2010); N.C. GEN. STAT. §§ 130A-491 to -498 (2010); TENN. CODE ANN. §§ 39-17-1803 to -1812 (2010); WIS. STAT. § 101.123 (2010). None of these statutes specifically exempt actors participating in live theatrical performances and the owners and operators of such theaters.

C. Denial Of A Preliminary Injunction By The Denver District Court.

Three small, independent Denver theaters, two of which are the petitioners here,[2] sought a preliminary injunction from the Denver district court to avoid criminal liability if they staged a play in which smoking is an integral part of the plot.[3] The Denver district

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[2] The third theater ended operations during the appellate process.

[3] The theaters challenged the smoking ban pre-enforcement. As the legislative history makes clear, the general assembly

(Continued on following page)

court held a hearing on October 30, 2006, during which the theaters introduced exhibits and testimony to support injunctive relief based on their right to free expression.

The theaters' evidence showed the importance of smoking – whether of actual tobacco or tobacco-free alternatives – during plays in which the script calls for smoking. The theaters presented the testimony of four witnesses with combined professional theatrical experience in excess of 60 years. All four were emphatic that smoking is part of the theatrical expression of numerous plays and is vital to the development of a character or group of characters. One witness testified about his company's upcoming production of the play, *tempOdyssey*, in which a character initially smokes, then realizes he has died because he can no longer smoke, thus making smoking an essential part of a plot twist. (App. 24-25).

Another witness confirmed the importance of maintaining the artistic integrity of a play by using

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considered and rejected an exemption for theaters from the smoking ban. (App. 50). Thus, the theaters reasonably anticipated that they risked criminal sanctions if they allowed smoking in a play. The cumulative nature of those sanctions chilled any thought of ignoring the ban. Further, the State never suggested its officials would "look the other way." To the contrary, John Suthers, the Colorado Attorney General, who presented the State's position in oral argument before the Colorado Supreme Court, assured the justices that the State would enforce the statute against the theaters if given the opportunity to do so.

cigarettes, particularly when performing older pieces by deceased playwrights, where all that is known about their intentions is what is in their script. He went on to state that smoking was integral to numerous plays, both planned and already presented by his company, including: *Who's Afraid of Virginia Woolf?*, by Edward Albee; *Mojo*, by Jez Butterworth; *Look Back in Anger*, by John Osborne; *Buicks*, by Julianne Shepherd; *Sailor Song*, by John Patrick Shanley; *Vieux Carre*, by Tennessee Williams; *A Moon for the Misbegotten*, by Eugene O'Neill; and *The Caretaker*, by Harold Pinter. (App. 25). The theaters also proved the chilling impact that the smoking ban would have on future presentations in Colorado, including being forced to choose plays based not on their artistic merit but on whether they required smoking. Indeed, the theaters demonstrated that they would be contractually precluded from presenting plays that included smoking where the playwright requires strict adherence to the script. (App. 38).

The evidence also showed the limited nature of most theatrical smoking. For Petitioner Curious Theatre's planned presentation of *tempOdyssey*, only one partial, non-traditional tobacco cigarette was to be smoked. The maximum amount of smoking that was described for any play was 15-20 minutes spread out over two hours. (App. 37 n.3).

All four witnesses insisted that so-called prop or fake cigarettes – in which an actor blows a puff of talc out of the "cigarette" – were inadequate substitutes

for real smoking. One testified that an audience laughed at the use of a fake cigarette during a drama when laughter was not the play's intent. (App. 41).

The theater company representatives also testified that their respective companies provided advance notice to their audiences if smoking was to occur on stage. (App. 35-36). They added that actors were informed about the need for smoking during auditions, and that no actor or crew member was forced to be near any smoking. (App. 36).

Just as notable as the evidence put on by the theaters is the evidence the State never presented in response. While the State listed exhibits on the health dangers of smoking tobacco and inhaling it second hand, it produced no viable scientific studies to show that tobacco alternatives, including those encompassed by the Colorado Clean Indoor Air Act, pose similar health risks. (App. 32-35). Nor was there evidence of any harm specific to smoking in theatrical performances. Yet, at the close of the theaters' evidence, the court held for the State without requiring any responsive evidence, and concluded that theatrical smoking did not constitute expression.

D. Opinion Of The Colorado Court Of Appeals.

The Colorado Court of Appeals affirmed the district court's denial of a preliminary injunction, although on different grounds. The court of appeals reached its decision through a three-step process: (1) contrary to the district court, it determined that

smoking in the theatrical context *does* constitute expressive conduct for First Amendment purposes (App. 55-61); (2) it deemed the applicable provisions of the Colorado Clean Indoor Air Act to be content neutral because the statute focused on health rather than speech (App. 61-62); and (3) it applied the four-part intermediate scrutiny test of *United States v. O'Brien*, 391 U.S. 367 (1968), and held that the Colorado smoking ban met that test, including the fourth requirement of narrow tailoring (App. 63-69). The court agreed with the State's assertions that adequate alternative channels of expression existed because plays could be staged outdoors (even though Petitioners both operate small *indoor* theaters) and that fake, talcum-powder cigarettes could serve as effective substitutes in indoor performances (despite the undisputed testimony to the contrary). (App. 67-68).

E. Opinion Of The Colorado Supreme Court.

1. Majority Opinion By Justice Nathan B. Coats.

The Colorado Supreme Court affirmed the judgment of the Colorado Court of Appeals by a 6-1 vote. The majority opinion by Justice Coats assumed, without deciding, that theatrical smoking constituted, or at least could constitute, protected expression. (App. 4, 7-8). But it concluded that, "Even assuming that theatrical smoking actually can amount to protected expressive conduct under some circumstances,

the statutory ban does not impermissibly infringe on the plaintiffs' constitutional freedom of expression because it is content neutral and narrowly tailored to serve the state's substantial interest in protecting the public health and welfare." (App. 4).

2. Dissenting Opinion By Justice Gregory J. Hobbs.

In dissent, Justice Hobbs demonstrated that theatrical smoking constitutes protected expression, that the smoking ban is not narrowly tailored, and that the State had provided no evidence to justify the statute's broad reach to any "plant matter." First, by reference to such plays as *Who's Afraid of Virginia Woolf?* by Edward Albee, *The Graduate* adapted for theater by Terry Johnson, *A Moon for the Misbegotten* by Eugene O'Neill, and *Vieux Carre* by Tennessee Williams, Justice Hobbs concluded that theatrical smoking did, in fact, constitute expressive conduct. He noted that all of these plays feature smoking as an integral tool for properly portraying characters and developing plots. (App. 23-26). Justice Hobbs also noted that smoking can be and has been used in plays to convey political messages. (App. 26-27).

Second, Justice Hobbs concluded that

> Colorado's smoking ban is not narrowly tailored as applied to theatrical performances that call for smoking because the statutory ban bars the use of any plant matter in addition to products of the tobacco plant, fails to take into account measures that limit exposure to patrons of the theater to demonstrably

> harmful tobacco products, and renders alternative means of the protected First Amendment expression untenable and even laughable.

(App. 23). Quoting *Frisby v. Shultz*, 487 U.S. 474, 485 (1988), Justice Hobbs noted that "'[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.'" (App. 31). The State, having presented no evidence, did not meet this requirement. (App. 31-32). Further,

> [p]ermitting smoking in theatrical performances would achieve the government's interest in public health no less effectively because citizens could choose to forego plays that include smoking, actors could refrain from auditioning for smoking roles if they prefer, and, in any event, the exposure to secondhand smoke from theatrical smoking is minimal.

(App. 38).

REASONS FOR GRANTING THE PETITION

I. The Issue Presented Provides This Court With An Opportunity To Clarify Whether General Laws Regulating Conduct, Which Are Not Specifically Directed At Expression, Warrant Any First Amendment Scrutiny.

The Colorado Supreme Court dismissed the theaters' contention that the smoking ban failed to allow "ample alternative channels of expression." The court

found that the "argument fails to appreciate that a general law regulating only conduct, no matter how symbolically expressive that conduct may be, by definition leaves unregulated the communication of any intended message by actual speech, writing, or publication." (App. 16). Thus, although Justice Coats never explicitly says so, his opinion essentially adopts the view shared by Justices Scalia and Thomas that "a general law regulating conduct and not specifically directed at expression [should not be] subject to First Amendment scrutiny at all." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 307-08 (2000) (Scalia, J., and Thomas, J., concurring in the judgment). This case starkly presents the effect of that approach on free expression. If this is indeed a correct interpretation of this Court's precedents, the First Amendment is of no consequence to a content-neutral law regulating conduct that has the effect of banning certain means of expression.

This issue is an important one warranting review for several reasons. First and foremost, free expression has been curtailed. Theatergoers can no longer experience many theatrical plays as intended by the playwright; the playwright's message has been altered, as recognized by the dissent. (App. 24-27, 38). And theatrical smoking, *i.e.*, smoking as part of the presentation of a play, is unquestionably expressive conduct. A theatrical script is speech. "By its nature, theater usually is the acting out – or singing out – of the written word, and frequently mixes speech with live action or conduct." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 557-58 (1975). Separating conduct from speech – within the context of a play –

ignores the fundamental nature of this form of expression. *Id.* The impact of the ban on free expression was cogently summarized by Justice Hobbs' dissent:

> The ability of a theatrical performance to communicate a plot, depict characters, and evoke an era according to the playwright's intent is severely limited by the inability to light a cigarette, pipe, or cigar on stage. Colorado's smoking ban lacks an exemption for the expressive conduct of theatrical smoking, allows no adequate alternative to theatrical smoking, and prohibits the smoking of tobacco alternatives.

(App. 41).

Next, this issue is one of first impression with a high likelihood of recurrence. Given that nearly all the states and many municipalities have adopted some form of smoking ban, and given the wealth of live theatrical performances constantly occurring across the country, the issue presented here will arise again and again. And if this Court declines to grant the Petition, the next state or federal trial court asked by actors, directors, producers, playwrights, or theater owners to allow smoking during the performance of a great play by a famous playwright (or any play for that matter), will no doubt begin its analysis by consulting the opinion of the Colorado Supreme Court. Compelling First Amendment questions like the one raised by this case instead ought to be decided with finality by the highest court in the land.

Finally, this Court has not addressed the scope of protection for theatrical expression for some 35 years.

Not since 1975 in *Conrad* has this Court decided a case concerning theatrical free expression (aside from the theatrical aspects of nude dancing). Here, the Colorado Supreme Court relied on three different lines of this Court's First Amendment jurisprudence, including "time, place and manner" decisions such as *Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984) and *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), symbolic conduct cases such as *O'Brien,* and the nude dancing decisions in *City of Erie,* and *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991). But these precedents are a poor fit for classic theatrical expression. As the Court stated in *Conrad*, "[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." 420 U.S. at 557. After 35 years, it is time for the Court to again assess the appropriate First Amendment standards for theatrical expression.

II. The Case Would Allow The Court To Clarify The Evidentiary Burden, If Any, On States To Show That A Content-Neutral Statute Restricting Free Expression Is Narrowly Tailored.

A. The Colorado Supreme Court Did Not Require Any Evidentiary Showing Whatsoever.

The district court denied the request for a preliminary injunction without requiring the State to

present *any* evidence. Likewise, after holding that smoking in the theatrical context constituted protected free expression, the Colorado Court of Appeals nonetheless found that the statute was narrowly tailored even though the State had presented no evidence. (App. 65-69). And the Colorado Supreme Court questioned whether any evidentiary showing was necessary in light of this Court's decision in *City of Erie*. (App. 16-17). As recognized by Justice Souter in his *City of Erie* concurrence, this Court's decisions on the government's evidentiary burden are confusing and should be clarified. 529 U.S. at 311. Otherwise, obvious accommodations for free expression – as were demonstrated by the theaters' evidence before the trial court – can be ignored. The State's supposed evidentiary burden becomes no burden at all.

B. The Opinion Below Rationalized The State's Lack Of Evidence By Relying On "Esthetic" Interests.

The Colorado Supreme Court also relied on the State's "esthetic interests" to cure the absence of any evidence of the health effects of non-traditional cigarettes. (App. 15-16). Justice Hobbs responded that "the majority's use of aesthetic grounds to totally ban on-stage smoking and criminalize violations of the ban, constitutes censorship in violation of the First Amendment." (App. 34). While the State may have legitimate esthetic interests to justify restrictions on expression in public areas, *see, e.g., Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789,

805-07 (1984), those interests should not extend to a theatrical presentation inside a privately-owned building. Nor did the State so contend; the Colorado Supreme Court created the State's esthetic interest from whole cloth. This unique extension of the government's interest in restricting expression should be reviewed.

C. The Colorado Clean Indoor Air Act Is Not Narrowly Tailored.

As Justice Hobbs discussed, the State did not affirmatively demonstrate that its prohibition on use of tobacco-free alternatives – in place of traditional cigarettes – is narrowly tailored to the State's interest in health, safety, and comfort. In fact, the State produced nothing to demonstrate the hazards of these tobacco-free cigarettes generally, much less when used in the limited context of live theater. (App. 32-35). If narrow tailoring is of true consequence within the context of a content-neutral restriction on free expression – particularly when the restriction is an outright ban – the State should be required to show that a less restrictive alternative will be ineffective in achieving the State's goals. The State failed to do so here, again warranting this Court's review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted this 15th day of March, 2010.

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SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, Colorado 80203 Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 06CA2260	Case No. 08SC351
Petitioners: Curious Theatre Company, a Colorado non-profit corporation; Paragon Theatre, a Colorado non-profit corporation; and Theatre13, Inc., a Colorado non-profit corporation, v. **Respondents:** Colorado Department of Public Health and Environment and James Martin, its Executive Director.	
JUDGMENT AFFIRMED EN BANC December 14, 2009	

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JUSTICE COATS delivered the Opinion of the Court.

JUSTICE HOBBS dissents.

The non-profit theaters that were plaintiffs below petitioned for review of the court of appeals' judgment affirming the denial of their motion for preliminary injunction. *See Curious Theater Co. v. Colo. Dep't of Pub. Health & Env't,* 216 P.3d 71 (Colo. App. 2008). Their action against the Colorado Department of Public Health and Environment seeks both a judgment declaring Colorado's ban on theatrical smoking to be an unconstitutional infringement on their freedom of speech and an order enjoining its enforcement. The district court denied their motion for preliminary injunction on the grounds that smoking, even in the

theatrical context, does not amount to expressive conduct of a type that would be subject to either state or federal constitutional protections for speech. The court of appeals concluded that theatrical smoking was expressive conduct but affirmed the district court on the alternative grounds that the ban was nevertheless constitutional.

Even assuming that theatrical smoking actually can amount to protected expressive conduct under some circumstances, the statutory ban does not impermissibly infringe on the plaintiffs' constitutionally protected freedom of expression because it is content neutral and narrowly tailored to serve the state's substantial interest in protecting the public health and welfare. The judgment of the court of appeals is therefore affirmed.

I.

Three non-profit theater companies, Curious Theatre Company, Paragon Theatre, and Theatre13, Inc., brought a declaratory judgment action against the Colorado Department of Public Health and Environment and its executive director, challenging the constitutionality of the Colorado Clean Indoor Air Act[1] and seeking to enjoin its enforcement against theatrical smoking. The Act prohibits smoking in any indoor area, including a theater, unless the smoking

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[1] §§ 25-14-201 to -209, C.R.S. (2009).

falls within an express statutory exception. The plaintiff-theaters asserted that theatrical smoking can include expressive conduct and that the Act's blanket prohibition against indoor smoking therefore amounts to an impermissible infringement on their freedom of speech, as guaranteed by both the federal and state constitutions.

The district court entertained evidence and the arguments of counsel before denying the plaintiffs' motion for preliminary injunction. At the hearing, the theaters presented the testimony of four witnesses with lengthy and varied professional theatrical experience, to the effect that smoking has been a part of theatrical expression in numerous plays; that the theaters provide advance notice to their audiences if smoking will occur onstage; and that prop or fake cigarettes are inadequate substitutes for real smoking. At the conclusion of this testimony, and without finding any need to receive evidence from the defendant-Department, the district court concluded that the plaintiffs had failed to make a number of the showings required for a preliminary injunction, including, most notably, a showing that they were likely to succeed on the merits of their claim. More specifically, it found that the plaintiffs had failed to prove that smoking, even in a theatrical context, can amount to expressive conduct to which either federal or state constitutional protections would extend.

The plaintiffs immediately appealed the denial of their motion for preliminary injunction to the intermediate appellate court. Although it disagreed with

the district court's conclusion that theatrical smoking is not expressive conduct, the court of appeals nevertheless affirmed the district court's refusal to grant a preliminary injunction, finding that the smoking ban is content neutral and is adequately tailored to meet constitutional requirements for a content-neutral, incidental restriction on expressive conduct.

We granted the plaintiffs' petition for a writ of certiorari challenging the court of appeals' determination that the smoking ban is constitutional.

II.

First Amendment protections notwithstanding, "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293 (1984). The United States Supreme Court has "often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* Although the "time, place, or manner" test was developed for evaluating restrictions on expression taking place on public property that had been dedicated as a public forum, it has also been applied to conduct occurring in what are essentially places of public accommodation. *See Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566 (1991) (plurality

opinion) (also noting previous application of "time, place, or manner" test to conduct occurring on private property in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

The delivery of messages by conduct that is intended to be, and in context would reasonably be understood to be, communicative has received particular attention in the jurisprudence of the Supreme Court. "Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech." *Clark*, 468 U.S. at 294 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). While each focuses on slightly different aspects of the inquiry, these two articulations of constitutionally permissible limitations on protected expression have nevertheless been interpreted to embody much the same standards, *see Clark*, 468 U.S. at 298; *see also City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272, 297 n.19 (Colo. 1995), and have been applied accordingly, *Clark*, 468 U.S. at 299 n.8 ("We note that only recently, in a case dealing with the regulation of signs, the Court framed the issue under *O'Brien* and then based a crucial part of its analysis on the time, place, or manner cases.").

Unlike conduct that is regulated or prohibited precisely because of the message it symbolically conveys, *see, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning), it is often unclear whether conduct

that is regulated without regard to any message it may convey is in fact "expressive" in a way that would be constitutionally protected. Although the Supreme Court has clearly rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *O'Brien,* 391 U.S. at 376; *see also City of Dallas v. Stanglin,* 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."), the Court has more than once chosen to simply assume a sufficient "communicative element" in regulated conduct where the regulation in question would pass constitutional muster in any event, *see, e.g., Clark,* 468 U.S. at 296 ("we have assumed for present purposes that the sleeping [in a national park] banned in this case would have an expressive element"); *O'Brien,* 391 U.S. at 376 ("even on the assumption that the alleged communicative element in [draft card burning] is sufficient to bring into play the First Amendment"); *cf. Barnes,* 501 U.S. at 565 (plurality opinion) ("'[A]lthough the customary "barroom" type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue,* 409 U.S. 109, 118 . . . (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.'" (quoting *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932 (1972)).

The plaintiffs readily concede that the regulation of smoking in public is within the constitutional power of the government; that it furthers an important governmental interest; and that the governmental interest it furthers is unrelated to the suppression of free expression. They assert only that the ban is not tailored adequately to serve the purpose for which it was adopted, bringing into question not only the extent to which tailoring to the service of a significant governmental interest is required by the First Amendment but also the precise nature of the governmental interest the ban was meant to serve.

Unlike a law directed at the content of speech or the communicative nature of conduct, it is not necessary for a content-neutral time, place, or manner restriction, much less the regulation of conduct for reasons completely unrelated to the suppression of free expression, to be justified by "a substantial showing of need," or compelling state interest. *Johnson*, 491 U.S. at 406-07. Nor must the content-neutral regulation of expression be limited to the least restrictive or least intrusive means of serving the government's interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). In fact, *O'Brien's* "relatively lenient standard" requires only that any incidental restriction on expressive conduct be no greater than is essential to the governmental interest in regulating the *conduct* at issue. *Johnson*, 491 U.S. at 407; *O'Brien*, 391 U.S. at 377.

Expressed otherwise, such content-neutral regulation is valid with regard to any requirement of

narrow tailoring so long as the government could reasonably have determined that its interests overall would be served less effectively without that regulation. *Ward*, 491 U.S. at 799. If the government has a legitimate interest in protecting the welfare of its citizens, and if the welfare of those citizens would be more exposed to harm without a particular regulation of conduct than with it, the regulation is safe from invalidation under the First Amendment. *See Clark*, 468 U.S. at 297 ("If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.").

Although the Supreme Court has on occasion required some demonstration of an evidentiary basis to connect the government's asserted rationale for regulating expressive conduct with the particular regulation itself, *see, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997), it has also made clear that this connection may be apparent, plain, or beyond doubt, without specific evidentiary support, *see, e.g., Clark*, 468 U.S. at 299 (acknowledging that a substantial governmental interest in conserving park property is plainly served by preventing overnight sleeping); *O'Brien*, 391 U.S. at 381 (finding "apparent" the governmental interest in maintaining the continued availability of draft cards and "equally

clear" that the prohibition against draft-card destruction protects this interest); *see also Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). In *City of Erie v. Pap's A.M.,* this issue was brought into focus by Justice Souter's partial dissent, which questioned whether establishments featuring dancers forced to wear "pasties" and "G-strings" would have a markedly different effect on neighborhoods from establishments whose dancers were completely nude. 529 U.S. 277, 314-17 (2000) (Souter, J., concurring in part and dissenting in part). The judgment of a four-justice plurality, rejecting Justice Souter's call for a firmer evidentiary connection, was joined by two additional justices who would not subject "a general law regulating conduct and not specifically directed at expression" to any First Amendment scrutiny at all. *Erie,* 529 U.S. 277; *id.* at 307-08 (Scalia, J., joined by Thomas, J., concurring in the judgment).

We consider it unnecessary to determine whether smoking in the theatrical context might in some cases contain an expressive element because we think it clear that, in any event, the statutory smoking ban at issue here withstands the plaintiffs' assertions that it is insufficiently tailored. The plaintiffs assert that the smoking ban is insufficiently tailored to satisfy the requirements of the Supreme Court's First Amendment jurisprudence for three distinct, but related,

reasons. They contend that: 1) the declared governmental interest in banning indoor smoking is more limited than was appreciated by the appellate court when it found the ban to be adequately tailored to the government's interest; 2) the record is devoid of any factual justification for a ban on theatrical smoking; and 3) the record does not support the appellate court's determination that the ban leaves open adequate alternate means of expression.

With regard to the government's interest, the plaintiffs assert that the General Assembly's use of the words "involuntary exposure" in its declaration[2] evidences its limited purpose of protecting only those who would choose to avoid places of public accommodation if forewarned that smoking would occur on the premises and, consequently, the General Assembly's failure to tailor its own regulatory scheme to that

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[2] Legislative Declaration, § 25-14-202 ("The general assembly hereby finds and determines that it is in the best interest of the people of this state to protect nonsmokers from involuntary exposure to environmental tobacco smoke in most indoor areas open to the public, public meetings, food service establishments, and places of employment. The general assembly further finds and determines that a balance should be struck between the health concerns of nonconsumers of tobacco products and the need to minimize unwarranted governmental intrusion into, and regulation of, private spheres of conduct and choice with respect to the use or nonuse of tobacco products in certain designated public areas and in private places. Therefore, the general assembly hereby declares that the purpose of this part 2 is to preserve and improve the health, comfort, and environment of the people of this state by limiting exposure to tobacco smoke.").

end. Apart from the fact that this interpretation of the term "involuntary" is, as a matter of statutory construction, simply untenable, the argument itself confounds the governmental interest to be served by regulating particular conduct with the method or approach chosen by the legislature to further that interest.

In the abstract, the term "involuntary," could have a number of different meanings. It could refer to a choice subject to any variety of external or internal pressures or, for that matter, to action devoid of any conscious choice whatsoever. Therefore, its precise meaning must be derived from the context, or statutory scheme, in which it appears. *See Walgreen Co. v. Charnes*, 819 P.2d 1039, 1043 & n.6 (Colo. 1991) (applying the rule that statutes relating to the same subject matter be construed in pari materia, gathering the legislative intent from the whole of the enactments). Were the term "involuntary exposure" restricted to exposure that could not be avoided by merely avoiding places where smoking is known to occur, as the plaintiffs propose, rather than encompassing any exposure to the smoking of others that must be endured as a cost of enjoying the benefits of places of public accommodation, the purpose would be met in all cases by the mere posting of warnings, which would render the legislative ban on indoor smoking entirely superfluous. While the intended meaning of an ambiguous statute might be clarified by reference to an unambiguous declaration of legislative purpose, *see, e.g., Vensor v. People,* 151 P.3d

1274, 1277 (Colo. 2007), it would make little sense to construe an ambiguous declaration of purpose as having a meaning that renders the legislature's specific proscriptive provisions themselves superfluous and, in this case, unconstitutional, *see Catholic Health Initiatives Colo. v. City of Pueblo,* 207 P.3d 812, 822 (Colo. 2009) (the court has an obligation to avoid statutory interpretations that invoke constitutional deficencies).

Perhaps more to the point, however, the legislative declaration in this case expressly states that the Act's purpose is "to preserve and improve the health, comfort, and environment of the people of this state by limiting exposure to tobacco smoke." § 25-14-203. The determination of the General Assembly that "it is in the best interest of the people of this state to protect nonsmokers from involuntary exposure to environmental tobacco smoke in most indoor areas open to the public," when read in context, evidences the balance struck "between the health concerns of nonconsumers of tobacco products and the need to minimize unwarranted governmental intrusion into" private choices – not its purpose or interest. *Id.* Rather than contradicting itself or obtusely failing to grasp that its regulatory scheme was wholly unnecessary to its purpose, it seems abundantly clear that the General Assembly's purpose was to protect its citizens from exposure to the smoking of others without at the same time forcing them to choose between their comfort or health, on the one hand, and

the benefits offered by regulated, public accommodations, on the other.

With regard to the demonstration of an evidentiary connection between the government's rationale for regulating this conduct and its chosen means of doing so, there can simply be no question but that the state's legitimate interest in preserving and improving the health, comfort, and environment of the public is furthered by limiting the. public's exposure to environmental smoke, even from tobacco-free alternatives.[3] This is apparent without reliance on empirical studies detailing particular health risks associated with breathing second-hand smoke. Apart from its interest in the public's physical health, the State has "a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression" sufficient to justify a content-neutral restriction on expression. *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 805-07 (1984); *see also Berman v. Parker,* 348 U.S. 26, 33 (1954) ("The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (citation omitted)). As was the

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[3] For purposes of the Colorado Clean Indoor Air Act, tobacco is defined to include "cloves and any other plant matter or product that is packaged for smoking." § 25-14-203(17).

case with maintaining the availability of draft cards by prohibiting their destruction, *see O'Brien,* 391 U.S. at 381, and conserving park property by banning overnight camping, *see Clark,* 468 U.S. at 299, the connection between limiting exposure to environmental smoke and banning indoor public smoking in places of public accommodation is apparent without further evidentiary support.

Finally, with regard to their contention that the smoking ban permits no ample alternative channels of expression, the plaintiffs' argument fails to appreciate that a general law regulating only conduct, no matter how symbolically expressive that conduct may be, by definition leaves unregulated the communication of any intended message by actual speech, writing, or publication. Perhaps for this reason, the Supreme Court has never included a separate requirement for alternate channels of communication in its standard for regulating expressive conduct, as it has in its standard for time, place, or manner restrictions generally. *See, e.g., Clark,* 468 U.S. at 293-94. Even with respect to time, place, or manner restrictions on constitutionally protected speech itself, however, the Supreme Court has required only that otherwise narrowly-tailored, content-neutral restrictions also leave open "ample alternative channels for communication of the information," *see id.* at 293, not alternative channels with equivalent dramatic impact.

Accepting that there may exist certain kinds of expressive conduct for which actual speech could not

provide an adequate substitute, such as, erotic dancing, the Supreme Court has made clear that regulations limiting the full expressive impact of such conduct can nevertheless comport with the First Amendment. *See Erie,* 529 U.S. at 301 (plurality opinion) (although prohibiting full nudity, a law permitting dancers wearing "pasties" and "G-strings" leaves open ample alternative channels of expressing the message of erotic dancing). Whether or not the use of a fake or prop cigarette can have precisely the same dramatic impact or convey the same degree of realism as an actual, burning, smoke-producing cigarette, it, like the theatrical use of substitutes for virtually every other type of dangerous or illegal conduct, is capable of amply communicating to an audience an intended message. Especially in the context of a theatrical performance, where the message is typically conveyed by imitation rather than by scientific demonstration, some resultant lack of realism cannot be considered fatal to the regulation of conduct.

Because it is clear, without further evidentiary support, that the state has a significant interest in protecting the health and welfare of its citizens and that the welfare of those citizens would be more exposed to harm without the smoking ban than with it, the ban is adequately tailored for purposes of the First Amendment to the United States Constitution.

III.

The guarantees of the First Amendment are applicable to the states through the Due Process Clause of the Fourteenth Amendment, *Douglas v. City of Jeannette,* 319 U.S. 157, 162 (1943); *Marco Lounge, Inc. v. City of Federal Heights,* 625 P.2d 982, 983 n.1 (Colo. 1981), and the Supremacy Clause of the Federal Constitution establishes their precedence over conflicting state constitutional provisions. Like other protections of the Bill of Rights, however, the First Amendment limits the power of the federal and state governments to abridge individual freedoms, not the power of states to even further restrict governmental impairment of those individual freedoms. *See PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 80-81 (1980); *Bock v. Westminster Mall Co.,* 819 P.2d 55, 59 (Colo. 1991). The plaintiffs assert that article II, section 10 of the Colorado Constitution is more restrictive of the enactment of laws regulating expressive conduct than the First Amendment.

This court is the final arbiter of the meaning of the Colorado Constitution, and as such, it is clearly within its power to determine that the state constitution places restrictions on legislative action even greater than those imposed by the Federal Constitution. In the past, we have, however, generally declined to construe the state constitution as imposing such greater restrictions in the absence of textual differences or some local circumstance or historical justification for doing so. Simply disagreeing with the United States Supreme Court about the meaning of

the same or similar constitutional provisions, even though we may have the power to do so, risks undermining confidence in the judicial process and the objective interpretation of constitutional and legislative enactments.

With regard to constitutional guarantees of freedom of speech, the text of article II, section 10 actually differs from that of the First Amendment. In addition to prohibiting, in very similar terms, the enactment of laws "abridging" or "impairing" the freedom of speech, the state constitution goes on to affirmatively guarantee the freedom of every person "to speak, write, or publish whatsoever he will on any subject," without prior approval or restraint, subject only to being held accountable for any abuse of that liberty. *See generally* Thomas M. Cooley & Walter Carrington, 2 *Cooley's Constitutional Limitations* 876-98 (8th ed. 1927) (collecting numerous similar state constitutional provisions and emphasizing their departure from the wide-spread acceptance of prior restraints on publication that existed at common law). Noting this textual difference, we have at times characterized the state constitution as providing greater protection for individual freedom of expression than the Federal Constitution. *See, e.g., Tattered Cover, Inc. v. City of Thornton,* 44 P.3d 1044, 1054 (Colo. 2002); *Bock,* 819 P.2d at 58. We have, however, rarely, if ever, construed article II, section 10 to circumscribe more narrowly than the First Amendment the regulatory powers of government.

Although we may not have initially intended to interpret article II, section 10 as deviating from First Amendment mandates on the issue, we have continued to demand proof by clear and convincing evidence of actual malice before a private individual may recover under the law of libel in all matters of public interest, even after learning that the Federal Constitution would extend this evidentiary requirement no further than allegations of libel by public figures. *See Walker v. Colo. Springs Sun, Inc.*, 188 Colo. 86, 98, 538 P.2d 450, 457 (1975) (adopting greater protections without reference to the Colorado Constitution and specifically qualifying its reliance on another court that reached the same result by noting that the other court "relied in some part upon a state constitutional provision"); *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1109 (Colo. 1982) (concluding that *Walker* must have been based on article II, section 10, and conforming the *Walker* protections for statements related to public issues to the federal standard for statements about public officials). We have also enforced the protections of article II, section 10 against certain nongovernmental entities by interpreting the concept of "state action" more generously than would the Supreme Court with respect to the First Amendment. *Bock*, 819 P.2d at 60. And although we expressly rejected an invitation to follow the lead of at least one other jurisdiction with similarly broad protections for freedom of speech and to find obscenity to be a form of constitutionally protected speech, we nevertheless held that "obscenity" must be limited to materials that cannot be "tolerated" by the

community, whether or not a community standard of "acceptance" might ultimately be found adequate to satisfy the requirements of the First Amendment. *People v. Ford,* 773 P.2d 1059, 1066 (Colo. 1989).

Finally, we have relied on the broader protections of both sections 7 and 10 of article II to impose a more onerous burden on law enforcement investigations seeking specific customer purchase records from innocent, third-party bookstores than would be required by the Fourth Amendment of the Federal Constitution. *Tattered Cover,* 44 P.3d at 1056. In doing so, however, we made clear that we considered the imposition of a "strict scrutiny" or "compelling need" requirement on this kind of "search" to be justified by the state constitution only because the purchase records were sought specifically to discover the content or ideas contained in a particular customer's reading material. *Id.* at 1057 n.23, 1059. *Contra Pap's A.M. v. City of Erie,* 812 A.2d 591, 612 (Pa. 2002) (requiring strict scrutiny whenever protected expression is involved, even if the regulation is content neutral).

With respect to content-neutral time, place, or manner regulations and the regulation of conduct incidentally affecting symbolic expression, by contrast, we have applied the four-part test of *O'Brien* to uphold legislation against challenges under both the First Amendment and article II, section 10, without suggesting any distinction between the two. *See 7250 Corp. v. Bd. of County Comm'rs,* 799 P.2d 917, 924-28 (Colo. 1990) (regulation of conduct); *Williams v. City*

and County of Denver, 622 P.2d 542, 546 (Colo. 1981) (time, place, and manner regulations). And we see no basis in the text of article II, section 10, or in local circumstance or history, for departing from this precedent.

IV.

Because the Colorado Clean Indoor Air Act is content neutral and narrowly drawn to further the state's substantial interest in protecting the public health and welfare, its prohibition of smoking, even in the theatrical context, does not impermissibly infringe on the plaintiffs' constitutionally protected freedom of expression, as guaranteed by either the federal or state constitution. The judgment of the court of appeals is therefore affirmed.

Justice Hobbs, Dissenting

I would reverse the court of appeals judgment and hold that the smoking ban contained in the Colorado Clean Indoor Air Act, as applied to theatrical performances when the script of a play calls for smoking, is unconstitutional because theatrical smoking constitutes expressive conduct protected by the First Amendment. Under the applicable constitutional standard, the state must carry its burden of demonstrating that its prohibition of expressive conduct is narrowly tailored to meet a significant governmental interest. *See Clark v. Cmty.*

for Creative Non-Violence, 468 U.S. 288, 298 (1984) (applying the *United States v. O'Brien*, 391 U.S. 367, 377 (1968) test); *Denver Publ'g Co. v. City of Aurora*, 896 P.2d 306, 312-17, 319 (Colo. 1995).

In this case, the state has failed to meet its burden because the smoking ban leaves the theaters without adequate alternate channels for their expression. *See Denver Publ'g*, 896 P.2d at 316-17. The majority finds the fourth *O'Brien* factor, requiring that the ban be narrowly tailored, has been satisfied because adequate alternatives exist for the expressive conduct under *Clark*, 468 U.S. at 293, 296-99, and *Denver Publishing*, 896 P.2d at 313-17. I respectfully disagree.

Colorado's smoking ban is not narrowly tailored as applied to theatrical performances that call for smoking because the statutory ban bars the use of any plant matter in addition to products of the tobacco plant, fails to take into account measures that limit exposure to patrons of the theater to demonstrably harmful tobacco products, and renders alternative means of the protected First Amendment expression untenable and even laughable.

A. Theatrical Smoking Is Expressive Conduct

Live drama, no less than written or spoken word, can communicate "pungent social and political commentary." *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563-64 (1975) (Douglas, J., dissenting in part and concurring in part). Thus, theater as a

medium is afforded First Amendment protection. *See id.* at 557-58 (majority opinion).

In order to determine whether smoking within theatrical performances is conduct that is sufficiently expressive to be protected under the First Amendment, the court must determine whether (1) "an intent to convey a particularized message was present" and (2) "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson,* 491 U.S. 397, 404 (1989) (quotations and citations omitted). Smoking by itself is not expressive conduct. *NYC C.L.A.S.H., Inc. v. City of New York,* 315 F. Supp. 2d 461, 476 (S.D.N.Y. 2004). However, smoking by performers in a play when a script calls for it meets the *Johnson* test.

With respect to the first prong of the *Johnson* test, witnesses with extensive theatrical experience testified before the trial court that smoking is included by playwrights to develop character and plot. One witness testified that "[smoking]'s at the very, very core of character development and storytelling. . . . [I]t's as necessary as if a character is a soldier and is supposed to have a gun in their hand."

The theaters point to a specific upcoming production of *tempODYSSEY,* a play in which a character initially smokes, then realizes he has died because he can no longer smoke. The script describes this dramatic moment:

> [CHARACTER]: It's over. All over.
>
> ([CHARACTER] pulls out his smokes, still crying, sticks one in his mouth and tries to light up. Nothing. He inhales harder. Nothing. He throws it to the ground, pulls out another, lights up, nothing. . . . He squashes his cigarettes one by one)
>
> [CHARACTER]: No smoke. No air. No breath. No scream. No sound.

Dan Dietz, *tempODYSSEY* 49 (Dramatists Play Service, Inc.) (2007).

The theaters also point to other plays that utilize smoking as a tool for expressing character and story, such as *Who's Afraid of Virginia Woolf?* by Edward Albee, *The Graduate* adapted for theater by Terry Johnson, *A Moon for the Misbegotten* by Eugene O'Neill, *Mojo* by Jez Butterworth, and *Vieux Carre* by Tennessee Williams. For example, in *Who's Afraid of Virginia Woolf?*, a main character, George, uses the cloud of cigarette smoke on stage as a descriptive tool:

> GEORGE: I'm forty-something. (Waits for reaction . . . gets none.) Aren't you surprised? I mean . . . don't I look older? Doesn't this *gray* quality suggest the fifties? Don't I sort of fade into backgrounds . . . get lost in cigarette smoke?

Edward Albee, *Who's Afraid of Virginia Woolf?* 19 (Dramatists Play Service, Inc., Rev. Ed. 2004) (1962).

In *The Graduate,* the exhale of smoke shows the character Mrs. Robinson's power over young Benjamin:

> MRS. ROBINSON: . . . I'll get undressed now. Is that alright?
>
> BENJAMIN: Sure. Fine.
>
> ([MRS. ROBINSON] stands up, takes a last pull on her cigarette and turns to put it out. BENJAMIN moves closer and kisses her. When their lips part she exhales her cigarette smoke. She takes off her jewelry then begins to unbutton her blouse.)

Terry Johnson, *The Graduate* 32 (Samuel French, Inc. 2003) (2000).

As the court of appeals points out, theatrical smoking can be used to make political statements about smoking itself. *Curious Theater Co. v. Colo. Dep't of Pub. Health & Env't,* 216 P.3d 71, 79 (Colo. App. 2008); *see* David Conrue, Sam Holtzapple, Warren Loy, & Chris Todd, *Smoking Bloomberg,* http://www.smokingbloomberg.com (last visited Dec. 9, 2009) (a Broadway musical comedy about New York City Mayor Michael Bloomberg's ban on smoking tobacco in public places, which has been described as "explor[ing] the loss of personal freedoms in modern-day America, targeting the Left, the Right, and everyone in between." Kenneth Jones, *Smoking Bloomberg, the Musical, Gets Transport Group Reading in NYC April 22,* Playbill, Apr. 22, 2009,

http://www.playbill.com/news/article/128495-Smoking_Bloomberg_the_Musical_Gets_Transport_Group_Reading_in_NYC_April_22 (last visited Dec. 9, 2009)).

In a play's performance, smoking becomes a form of expression that is distinct from the act of smoking itself; it is used to communicate meaning and thus "to convey a particularized message." *See Johnson,* 491 U.S. at 404. The characters and plots would lack depth and expressive force without the hovering smoke on stage, the poignant exhale of a puff of smoke, and even the ability or inability to smoke.

"Would Mrs. Robinson be as much of a smoldering volcano in 'The Graduate' if she could not wave her cigarette so suggestively? Would George and Martha's living room broadsides in 'Who's Afraid of Virginia Woolf?' be equally vicious without their boozy veil of smoke?" Kirk Johnson, *Colorado Court Rules "No Smoking" Means Exactly That, Even on Stage,* N.Y. Times, Mar. 21, 2008, *available at* http://www.nytimes.com/2008/03/21/us/21smoke.html. No.

The second prong of the *Johnson* test requires that at least some of the audience perceive that theatrical smoking has some message, even if the audience does not comprehend its intended point. *See Holloman ex rel. Holloman v. Harland,* 370 F.3d 1252, 1270 (11th Cir. 2004); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection," and if First Amendment protection were so

defined, it "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.").

It is reasonable that some audience members would perceive a message from the use of cigarette, cigar, or pipe smoking in such plays as described above. *See Holloman,* 370 F.3d at 1270. Therefore, the *Johnson* test is satisfied; theatrical smoking is expressive conduct for First Amendment purposes.

Once the conduct is proven to be expressive, *O'Brien* applies. *See* 391 U.S. at 377. Here, the theaters agree with the state that *O'Brien's* first three factors are met: (1) Colorado's legislature has the authority to enact statutes, such as the smoking ban, that promote public health; (2) the legislature's purpose in enacting the smoking ban, to protect the health of the state's citizens, § 25-14-202, C.R.S. (2009), serves an important governmental interest; and (3) the smoking ban is content neutral.

In this case, the majority finds the fourth *O'Brien* factor, requiring that the ban be narrowly tailored, has been met and adequate alternatives exist for the expressive conduct under *Clark,* 468 U.S. at 293, 296-99, and *Denver Publishing,* 896 P.2d at 313-17. I disagree. A closer analysis of the statute and an assessment of the available alternatives to theatrical smoking reveal that the majority's conclusion is untenable.

B. Colorado's Smoking Ban Is Not Narrowly Tailored

The Colorado Clean Indoor Air Act bans all smoking of tobacco in any indoor area, including theaters. § 25-14-204(1) (x), C.R.S. (2009). The legislative declaration states the statute is meant to effectuate a balance to protect nonsmokers from involuntary exposure to tobacco smoke and unwarranted governmental intrusion:

> The general assembly hereby finds and determines that *it is in the best interest of the people of this state to protect nonsmokers from involuntary exposure to environmental tobacco smoke in most indoor areas open to the public,* public meetings, food service establishments, and places of employment. *The general assembly further finds and determines that a balance should be struck between the health concerns of nonconsumers of tobacco products and the need to minimize unwarranted governmental intrusion into, and regulation of, private spheres of conduct and choice with respect to the use or nonuse of tobacco products in certain designated public areas and in private places.* Therefore, the general assembly hereby declares that the purpose of this part [ ] is to preserve and improve the health, comfort, and environment of the people of this state by limiting exposure to tobacco smoke.

§ 25-14-202 (emphasis added). However, the statute goes on to broadly define "tobacco" to include any

"plant matter or product that is packaged for smoking." § 25-14-203(17), C.R.S. (2009) ("Tobacco' also includes cloves and any other plant matter or product that is packaged for smoking."). The state has failed in this case to prove that the ban is narrowly tailored to allow adequate alternative means of expression for theatrical performances.

Colorado's ban on indoor smoking is among the most restrictive in the country. Of the twenty-four states that have indoor smoking bans, at least twelve have exemptions for theatrical performances or grant exemptions on a case-by-case basis. *See Curious Theater,* 216 P.3d at 75-76. Only three states, in addition to Colorado, ban theatrical smoking and also ban smoking of cigarettes made from cloves, tea leaves, or other tobacco alternatives. *See, e.g.,* N.J. Rev. Stat. §§ 26:3D-57, -59 (2009); Mont. Code Ann. §§ 50-40-103(8), -104 (2009); Wash. Rev. Code § 70.160.020 (2009).

Despite the especially broad ban on smoking in Colorado, airport smoking concessions are exempted. § 25-14-205(1)(f), C.R.S. (2009). This exemption is not justified by the stated legislative purpose of the smoking ban and, in fact, works against this stated purpose. *See* § 25-14-202 ("the purpose of [the ban] is to preserve and improve the health, comfort, and environment of the people of this state by limiting exposure to tobacco smoke"). In contrast, other exemptions, such as the exemption for hotel rooms, § 25-14-205(1)(c), clearly work towards the legislature's goal of striking a balance "between the health

concerns of nonconsumers of tobacco products and the need to minimize unwarranted governmental intrusion into, and regulation of, private spheres of conduct," § 25-14-202.

To be narrowly tailored to serve a content-neutral purpose, the state's regulation "need not be the least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism,* 491 U.S. 781, 798 (1989). The state must prove that the regulation promotes a government interest that would be achieved less effectively absent the restriction. *Id.* at 799; *Denver Publ'g,* 896 P.2d at 314, 319. Nonetheless, "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward,* 491 U.S. at 799. "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Shultz,* 487 U.S. 474, 485 (1988).

The state bears the burden of proving that the smoking ban's incidental burden on expressive theatrical conduct is narrowly tailored. *See Denver Publ'g,* 896 P.2d at 319. Contrary to the majority's contention that no specific evidentiary support is necessary to justify the statute here, maj. op. at 11-12, we have held that the quantum of evidence required for a statute to withstand constitutional review is necessarily included within the constitutional test. *Denver Publ'g,* 896 P.2d at 319 n.20; *see also City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 416, 416 n.12 (1993) ("[S]ince the State bears the

burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require."). Thus, the state must demonstrate that its prohibition against smoking tobacco-free alternatives is narrowly tailored to the state's interest in the public's health, safety, and comfort. *See Denver Publ'g,* 896 P.2d at 319. The state has not carried this burden.

The state presented several exhibits to the trial court dealing with the health consequences of smoking; however, the state provided no support for the claim that the smoking of or secondhand smoke from tobacco-free alternatives poses a public health risk. The state's exhibits included the Surgeon General's 2006 report on the health consequences of tobacco smoke. Def.'s Ex. D. However, this highly reputable report considered only the effects of secondhand smoke from tobacco cigarettes and not their tobacco-free counterparts. *Id.*

The state also provided three exhibits touting the health hazards of herbal or "alternative" cigarettes. The first is a press release from the Federal Trade Commission ("FTC") regarding a settlement reached between the FTC and companies selling tobacco-free herbal cigarettes. Def.'s Ex. G. The FTC alleged that the companies "falsely implied that smoking [ ] herbal cigarettes did not pose the health risks associated with smoking tobacco cigarettes." *Id.* In response to this claim, the companies agreed to disclose that herbal cigarettes are dangerous to health in future advertising. *Id.* Not only did this news release not cite any studies or scientific information relating to

the health risks of herbal cigarettes, but a settlement agreement can hardly be used as evidence supporting the government's position that the secondhand smoke from tobacco-free alternatives poses a risk to the public health.[1]

The second exhibit is from the website http://www.yourhealthconnection.com and relies heavily on the FTC's settlement order; however, the exhibit cites no scientific studies in support of the state's claims. Def.'s Ex. F.

The final exhibit dealing with herbal cigarettes is a briefing by an advocacy group, ASH Scotland, to the Health Minister of Scotland advocating the inclusion of non-tobacco products in legislation banning environmental tobacco smoke. Def.'s Ex. H. ASH Scotland admits in its briefing that peer-reviewed, published evidence on non-tobacco cigarettes is sparse, but goes on to rely on a 1990 Australian study that found some similarities between tobacco and non-tobacco cigarettes. *Id.* However, evidence of non-tobacco products' connection to adverse public health effects is lacking.

The majority asserts that "there can simply be no question but that the state's legitimate interest in preserving and improving the health, comfort, and environment of the public is furthered by limiting the

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[1] The press release included a disclaimer that "[a] consent agreement is for settlement purposes only and does not constitute an admission of a law violation." *Id.*

public's exposure to environmental smoke, even from tobacco-free alternatives." Maj. op. at 16. Dispensing with any requirement for a factual showing, the majority posits that the state has an "aesthetic interest" in banning the on-stage smoking of non-tobacco products, even "without reliance on empirical studies detailing particular health risks associated with breathing second-hand smoke." *Id.* at 16-17. The majority goes on to state that the legitimacy of this aesthetic interest is "apparent." *Id.* at 17.

However, the state in this case has not claimed an aesthetic interest in banning actors from smoking non-tobacco plant matter; rather, it contends that smoking the available alternatives adversely affects the public's health, safety, and comfort. In my view, in the absence of evidentiary support, the majority's use of aesthetic grounds to totally ban on-stage smoking constitutes censorship in violation of the First Amendment. What other aspects of Mrs. Robinson's dress, speech, or actions might be considered unacceptable on aesthetic grounds? *See Se. Promotions,* 420 U.S. at 563 (Douglas, J., dissenting in part and concurring in part) ("As soon as [the government is] permitted to pick and choose . . . between those productions which are 'clean and healthful and uplifting' in content and those which are not, the path is cleared for a regime of censorship under which full voice can be given only to those views which meet with the approval of the powers that be.").

Our cases require evidentiary support to justify the regulation of expressive conduct. *See Denver*

Publ'g, 896 P.2d at 319. This requirement protects First Amendment expression by imposing a burden of proof involving a convincing factual presentation. The authority cited by the majority does not support the claim that an aesthetic interest, by itself, is sufficient to justify a ban on expressive conduct. *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 805 (1984), stands only for the proposition that a state has a legitimate interest in advancing aesthetic values. Such an interest does not relieve the state from proving that its regulation is narrowly tailored to that interest. The majority also relies on *Berman v. Parker,* 348 U.S. 26 (1954), in which the U.S. Supreme Court evaluated the state's interest in the public welfare in the completely unrelated context of an eminent domain proceeding.

Taken together, the state's exhibits provide only conjectural support for its claim that the ban of tobacco-free cigarettes in theatrical performances is narrowly tailored to the government's interest in protecting the public. Thus, I would hold that the state has not met its burden of proving that any plant matter in addition to tobacco "is an appropriately targeted evil." *See Frisby,* 487 U.S. at 485. Moreover, Colorado's smoking ban is not narrowly tailored because the burden it places on theatrical smoking does not further the state's goal of "protect[ing] non-smokers from *involuntary* exposure to environmental tobacco smoke." § 25-14-202 (emphasis added).

The theaters proved to the trial court that no audience member would be forced involuntarily to

attend a play or inhale secondhand smoke. Patrons of the theaters typically buy tickets in advance rather than showing up on a given night, and advertisements for the plays generally make clear when smoking will occur on stage. The theaters offer warnings about the smoking at the time the ticket is sold and directly prior to the performance, and they offer refunds to any person choosing to forego viewing the play after being notified of the theatrical smoking. Additionally, when advertising to the acting community for roles that may require smoking on stage, directors disclose this requirement, leaving it up to the actor to decide whether or not to audition.[2]

The argument that such a scheme "forc[es] [citizens] to choose between their comfort or health, on the one hand, and the benefits offered by regulated, public accommodations, on the other," maj. op. at 16, fails to account for the unique nature of theatrical productions. Exposure to smoke during theatrical productions is by performers engaged in expression, while exposure to smoke from fellow patrons at places of public accommodation involves no expression whatsoever.

Moreover, exposure to smoke during theatrical performances is limited because the onstage smoking takes place at a distance from the audience and

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[2] The theaters contend that these practices were common prior to the smoking ban and are how they would manage theatrical smoking in the future.

scripts usually require the smoking of one cigarette or less.[3] A ban on smoking by theater patrons would strike the balance the legislature intended between protecting public health and avoiding overly intrusive governmental regulation, *see* § 25-14-202, while allowing expressive conduct by the actors in theatrical performances.

In *Ward,* the U.S. Supreme Court held New York City's requirement that performers at an outdoor amphitheatre in Central Park use the city's sound equipment and the city's sound technician to be narrowly tailored to the city's substantial interest in noise control. 491 U.S. at 800. The sponsors of a rock concert contended that this requirement "targets more than the exact source of the 'evil' it seeks to remedy." *Id.* at 801. The Court disagreed. *Id.* at 801-02.

However, the Court distinguished the following situation from the one at issue in that case: "If the city's regulatory scheme had a substantial deleterious effect on the ability of bandshell performers to achieve the quality of sound they desired, [the rock concert sponsor]'s concerns would have considerable force." *Id.* at 801. Thus, if the quality of a performance is substantially affected by the state's

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[3] The theaters' witnesses testified before the trial court that the maximum amount of smoking for any play was fifteen to twenty minutes spread out over two hours.

regulation, the argument that the regulation is narrowly tailored loses credibility.

In this case, the state's ban on theatrical smoking presents the situation the Court distinguished in *Ward*. Here, the smoking ban has a substantial effect on the ability of the theaters to achieve the intended effect of theatrical performances that include smoking, so much so that the theaters would choose not to present those performances where smoking was integral to the characters or plot.

The theaters demonstrated that they would be contractually precluded from presenting theatrical performances that include smoking where the playwrights require strict adherence to the script. This chilling effect on theatrical expression is unacceptable under the First Amendment. Permitting smoking in theatrical performances would achieve the government's interest in public health no less effectively because citizens could choose to forego plays that include smoking, actors could refrain from auditioning for smoking roles if they prefer, and, in any event, the exposure to secondhand smoke from theatrical smoking is minimal.

The substantial effect on the ability of the theaters to present some plays at all and, otherwise, on their ability to present authentic theatrical performances according to the playwrights' intent demonstrate that Colorado's smoking ban "targets more than the exact source of the 'evil' it seeks to remedy." *See Frisby,* 487 U.S. at 485.

Other states have avoided a First Amendment violation by narrowly tailoring their smoking bans to ensure that expressive conduct during theatrical performances is not prohibited or by allowing alternatives to smoking tobacco. Colorado's ban does not exempt theaters, and it prohibits the smoking of tobacco alternatives, such as cloves or tea leaves, which are often used instead of tobacco products during theatrical performances.[4] *See* § 25-14-203(17); *see also* Zachary Pincus-Roth, *No Smoking in the Theater, Especially Onstage,* N.Y. Times, Jan. 28, 2007, *available at* http://www.nytimes.com/2007/01/28/theater/28pinc.html?_r=1&scp=1&sq=pincus-roth%20no%20smoking&st=cse.

In contradiction to Colorado's theatrical smoking ban is the unjustified exemption for airport smoking concessions. *See* § 25-14-205(1)(f). There is no constitutional right at stake in the airport context, yet smoking is allowed. *See id.*; *see also NYC C.L.A.S.H.,* 315 F. Supp. 2d at 478-79 (holding that smoking in a public indoor establishment such as a bar or restaurant does not constitute expressive speech under the First Amendment because a smoker's motivation in that context is generally not to convey a message).

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[4] Actors that do not smoke often prefer tobacco-free cigarettes because they lack the addicting chemical nicotine, and the theaters testified that they also use tobacco-free cigarettes for the comfort of their patrons.

Despite the majority's confusion about whether an analysis of alternate channels of communication is appropriate when the law in question regulates only conduct, maj. op. at 17, the Supreme Court has expressly applied the alternate channels of communication analysis to cases involving expressive conduct. *Clark,* 468 U.S. at 295 (assessing the alternatives to the symbolic expression of individuals sleeping overnight in a national park to demonstrate the plight of homelessness); *Ward,* 491 U.S. at 802 (applying the alternatives analysis to a city regulation that allowed city control of a rock concert's sound mix). Where sufficient alternatives to the prohibited expressive conduct are available, the regulation can withstand constitutional scrutiny. *See Denver Publ'g,* 896 P.2d at 316-17.

The majority opinion fails to appreciate the communicative nature of smoking during theatrical performances. It holds that a fake or prop cigarette "is capable of amply communicating to an audience an intended message." Maj. op. at 19. Talcum cigarettes work by the actor blowing into the cigarette to cause a puff of talcum powder to be excreted. There is some debate whether talcum cigarettes can be used for more than the first puff of smoke. In any event, talcum cigarettes do not allow the actor to exhale smoke, since no smoke is actually inhaled. Prop cigarettes emit no smoke at all.

A single puff of talcum powder, or a prop cigarette with a reflective tip or light placed at the tip, can hardly depict the "boozy veil of smoke" necessary

to *Who's Afraid of Virginia Woolf?*. *See* Kirk Johnson, *Colorado Court Rules "No Smoking" Means Exactly That, Even on Stage,* N.Y. Times, Mar. 21, 2008, *available at* http://www.nytimes.com/2008/03/21/us/21smoke.html. Neither prop nor talcum cigarettes allow an actor to dramatically exhale a puff of smoke, as Mrs. Robinson does in *The Graduate.* One of the witnesses at trial testified that the audience had responded to a fake cigarette with laughter, though the author intended no comedy.

The ability of a theatrical performance to communicate a plot, depict characters, and evoke an era according to the playwright's intent is severely limited by the inability to light a cigarette, pipe, or cigar on stage. Colorado's smoking ban lacks an exemption for the expressive conduct of theatrical smoking, allows no adequate alternative to theatrical smoking, and prohibits the smoking of tobacco alternatives. Thus, it is not narrowly tailored to meet the state's legitimate interest in protection of the public's health, safety, and comfort.

Accordingly, I respectfully dissent.

COLORADO COURT OF APPEALS

Court of Appeals No.: 06CA2260
City and County of Denver District Court
No. 06CV 10876
Honorable Michael A. Martinez, Judge

Curious Theater Company, a Colorado non-profit company; Paragon Theatre, a Colorado non-profit company; and Theatre13, Inc., a Colorado non-profit company,

Plaintiffs-Appellants,

v.

Colorado Department of Public Health and Environment; and Dennis E. Ellis, Executive Director,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division II
Opinion by: JUDGE BERNARD
Rothenberg and Carparelli, JJ., concur

Announced: March 20, 2008

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Plaintiffs, Curious Theatre Company, Paragon Theatre, and Theatre13, Inc. (collectively, the Theaters), appeal the judgment denying their request for a preliminary injunction and a declaratory judgment against the enforcement of the Colorado Clean Indoor Air Act, sections 25-14-201 to -209, C.R.S. 2007 (the Smoking Ban), by the Colorado Department of Health and Environment and its Executive Director, Dennis Ellis (collectively, the Health Department), as applied to theatrical productions.

This case involves the question whether the Smoking Ban violates the Theaters' rights under the First Amendment and Colorado Constitution article II, section 10 because it precludes conduct – namely, smoking – that may be presented as part of certain theatrical productions. Because we conclude the Theaters' constitutional rights are not violated by the application of the Smoking Ban to them, we affirm.

I. Background

The Smoking Ban became effective on July 1, 2006. § 25-14-201, C.R.S. 2007; Ch. 22, sec. 9, 2006

Colo. Sess. Laws 63. It prohibits smoking "in any indoor area, including . . . [a]ny place of employment that is not exempted . . . [and] [theaters." § 25-14-204(1)(k)(I), (x), C.R.S. 2007. "Place of employment" refers to "any indoor area or portion thereof under the control of an employer in which employees of the employer perform services for, or on behalf of, the employer." § 25-14-203(12), C.R.S. 2007.

The Smoking Ban covers all smoking, not just cigarette smoking. § 25-14-203(16), C.R.S. 2007 ("Smoking' means the burning of a lighted cigarette, cigar, pipe, or any other matter or substance that contains tobacco."); § 25-14-203(17), C.R.S. 2007 ("Tobacco' also includes cloves and any other plant matter or product that is packaged for smoking.").

The facial constitutionality of the Smoking Ban was unsuccessfully challenged on due process and equal protection grounds in *Coalition for Equal Rights, Inc. v. Ritter,* ___ F.3d ___, ___ (10th Cir. No. 06-1511, Jan. 29, 2008).

In October 2006, the Theaters sought a judgment declaring the Smoking Ban unconstitutional under both the federal and state constitutions and prohibiting its enforcement because they wished to present plays in which characters smoked. The trial court denied their request after the Theaters set forth their evidence, but before the Health Department presented any evidence. The court ruled that "smoking, standing alone, including in the theatrical context" did not amount to "expressive conduct such

that First Amendment guarantees, and protections could be extended to it" and that the Theaters had not established that they had "a reasonable likelihood of success on the merits at trial."

II. Smoking Bans

Over the past several decades, there has been increasing evidence of the dangers of cigarette smoking and second-hand smoke. *See generally NYC C.L.A.S.H., Inc. v. City of New York,* 315 F. Supp. 2d 461, 476 (S.D.N.Y. 2004) (discussion of research detailing the harmful effects of smoking and subsequent regulations). We recognize that the legislature created the Smoking Ban to

> protect nonsmokers from involuntary exposure to environmental tobacco smoke in most indoor areas open to the public, public meetings, food service establishments, and places of employment. The general assembly further finds and determines that a balance should be struck between the health concerns of nonconsumers of tobacco products and the need to minimize unwarranted governmental intrusion into, and regulation of, private spheres of conduct and choice with respect to the use or nonuse of tobacco products in certain designated public areas and in private places. . . . [T]he purpose of this [Smoking Ban] . . . is to preserve and improve the health, comfort, and environment

> of the people of this state by limiting exposure to tobacco smoke.

§ 25-14-202, C.R.S. 2007.

In the 1970s, states, such as Arizona and Minnesota, enacted the first state-wide smoking bans. *See* Jordan Raphael, *The Calabasas Smoking Ban: A Local Ordinance Points the Way for the Future of Environmental Tobacco Smoke Regulation*, 80 S. Cal. L. Rev. 393, 399 (Jan. 2007). As the anti-smoking movement advanced, local ordinances predominated. *Id.* at 400. Such statutes and ordinances typically prohibit smoking indoors, but they may also forbid smoking in a few specified outdoor areas. *See* Calabasas, Cal., Mun. Code § 8.12.010 to 8.12.080 (2007).

More recently, a large number of states have enacted state-wide smoking bans, relying on their traditional police power to provide for the public health and safety as the authority to enact such legislation. *See In re Moyer*, 35 Colo. 159, 222, 85 P. 190, 211 (1904) (the legislature has a duty to protect the state's citizens).

The United States Supreme Court has recognized that the power to pass such laws

> extends . . . to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subject to all kinds of restraints and burdens in order to secure the general

> comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.

Slaughter-House Cases, 83 U.S. 36, 62 (1872) (quoting *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 149 (1854)); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

Smoking bans have been uniformly upheld against a variety of challenges to their validity. *See Elliott v. Bd. of Weld County Comm'rs*, 796 P.2d 71 (Colo. App. 1990) (due process, equal protection); *see also City of Tucson v. Grezaffi*, 23 P.3d 675 (Ariz. Ct. App. 2001) (Fifth Amendment taking, prohibition on special legislation, freedom of association, equal protection, government's ability to regulate health matters); *Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745 (Ky. 2004) (impermissible government interference with business, vagueness); *Traditions Tavern v. City of Columbus*, 870 N.E.2d 1197 (Ohio Ct. App. 2006) (vagueness, substantive due process, equal protection); *see also Thiel v. Nelson*, 422 F. Supp. 2d 1024, 1029-30 (W.D. Wis. 2006) (due process, equal protection challenges to smoking ban in prisons) (collecting cases).

Currently, more than half the states and the District of Columbia have some form of smoking ban. *See* Ariz. Rev. Stat. § 36-601.01 (2007); Cal. Lab. Code § 6404.5 (2007); §§ 25-14-201 to -209, C.R.S. 2007;

Conn. Gen. Stat. § 19a-342 (2007); Del. Code Ann. tit. 16, §§ 2901 to 2908 (2007); D.C. Code §§ 7-1701 to -1710 (2007); Fla. Stat. §§ 386.201 to .2125 (2007); Haw. Rev. Stat. §§ 328J-1 to -17 (2007); Idaho Code Ann. §§ 39-5501 to -5511 (2007); 410 Ill. Comp. Stat. 82/1 to /75 (2007); La. Rev. Stat. Ann. §§ 40:1300.251 to .263 (2007); Me. Rev. Stat. Ann. tit. 22, §§ 1541 to 1548 (2007); Md. Code Ann., Health-Gen. §§ 24-501 to -511 (2007); Mass. Gen. Laws ch. 270, § 22 (2007); Minn. Stat. § 144.414 (2007); Mont. Code Ann. §§ 50-40-101 to -115 (2007); Nev. Rev. Stat. §§ 202.2485 to .2492 (2007); N.H. Rev. Stat. Ann. §§ 155:64 to :77 (2007); N.J. Stat. Ann. §§ 26:3D-55 to -64 (2007); N.M. Stat. §§ 24-16-1 to -4 (as amended by H.B. 283, effective June 15, 2007); N.Y. Pub. Health Law § 1399-n to -x (2007); N.D. Cent. Code §§ 23-12-09 to -11 (2007); Ohio Rev. Code Ann. §§ 3794.01 to .09 (2007); Or. Rev. Stat. §§ 433.835 to .875 (2007); R.I. Gen. Laws § 23-20.10-1 to -16 (2007); S.D. Codified Laws § 22-36-2 (2007); Utah Code Ann. §§ 26-38-1 to -9 (2007); Vt. Stat. Ann. tit. 18, §§ 1741 to 1746 (2007); Wash. Rev. Code §§ 70.160.010 to .100 (2007).

Smoking bans are not exclusive to the United States, but are becoming more prevalent throughout the world. *See* Jessica Niezgoda, Note, *Kicking Ash(trays): Smoking Bans in Public Workplaces, Bars, and Restaurants Current Laws, Constitutional Challenges, and Proposed Federal Regulation*, 33 J. Legis. 99, 100-01 (2006); Eric A. Feldman, *The Culture of Legal Change: A Case Study of Tobacco Control in*

Twenty-First Century Japan, 27 Mich. J. Intl L. 743, 784-86 (2006).

Nevertheless, some jurisdictions have included exceptions for theatrical performances. *See* Ariz. Rev. Stat. § 36-601.01(B)(7) (2007) (ban not applicable to "[a] theatrical performance upon a stage or in the course of a film or television production if the smoking is part of the performance or production"); Cal. Lab. Code § 6404.5(d)(9) (2007) (ban does not apply to "[t]heatrical production sites, if smoking is an integral part of the story in the theatrical production"); D.C. Code § 7-1708(3) (2007) (does not prohibit smoking "[u]pon the stage by performers during the course of any theatrical performance if smoking is part of the theatrical production"); Idaho Code Ann. § 39-5503(1)(e) (2007) (ban does not apply to "[t]heatrical production sites, if smoking is an integral part of the story in the theatrical production"); Me. Rev. Stat. Ann. tit. 22, § 1542(2)(B) (2007) ("Smoking is not prohibited in theaters . . . if the smoking is solely by a performer and the smoking is part of the performance."); Mass. Gen. Laws ch. 270, § 22(c)(6) (2007) (theatrical performer may smoke during a performance if permission first granted by appropriate local authorities); Minn. Stat. § 144.4167(9) (2007) (smoking permitted "as part of a theatrical performance" as long as advance notice of smoking is given to theater patrons); N.M. Stat. § 24-16-4(N) (as amended by H.B. 283) (smoking is permitted on a "theatrical stage . . . when it is necessary for performers to smoke as part of the production"); R.I.

Gen. Laws § 23-20.10-6(b) (2007) ("this chapter shall not apply to any stage performance provided that smoking is part of a theatrical production"); N.Y.C. Admin. Code § 17-503(a)(8) (2007) ("except that smoking may be part of a theatrical production"); *cf.* Haw. Rev. Stat. § 328J-7(6) (2007) (exception only covers areas where "smoking is part of a production being filmed"). At least one state's smoking ban does not encompass theaters by definition. Nev. Rev. Stat. § 202.2491 (2007). Some jurisdictions grant exemptions on a case-by-case basis. N.Y. Pub. Health Law § 1399-u (2007).

The Colorado legislature, along with those of nineteen other states, has rejected a proposed amendment that would have created an exception to the Smoking Ban for theatrical productions. Second Reading of H.B. 1175, 65th Gen. Assemb., 2d Sess. (floor debate on Amendment L.030, Feb. 10, 2006). The legislature included other exceptions, such as an airport smoking area. § 25-14-205(1)(f), C.R.S. 2007. Enforcement of the Smoking Ban is assigned to the Health Department. § 25-1-109(1)(a), C.R.S. 2007.

III. Standard of Review

The purpose of a preliminary injunction is to protect against irreparable injury and to maintain a trial court's ability to render a "meaningful decision" after a trial on the merits. *Bloom v. Nat'l Collegiate Athletic Ass'n,* 93 P.3d 621, 623 (Colo. App. 2004). Requests for preliminary injunctions to prevent the

enforcement of criminal statutes are "extraordinary," and are "not justified except in the most exceptional circumstances." *Rathke v. MacFarlane,* 648 P.2d 648, 653 (Colo. 1982). The party seeking to enjoin the enforcement of a criminal law must, as a threshold matter, make a "clear showing that injunctive relief is necessary to protect existing legitimate property rights or fundamental constitutional rights." *Id.*

Generally, statutes passed to protect the public's health, safety, and welfare, are presumed to be reasonable. *U.S. Disposal Sys., Inc. v. City of Northglenn,* 193 Colo. 277, 281, 567 P.2d 365, 367 (1977); *Risen v. Cucharas Sanitation & Water Dist.,* 32 P.3d 596, 601 (Colo. App. 2001). However, in certain situations involving First Amendment rights, statutes are presumed to be unconstitutional, and the burden is upon the government to establish the statute's constitutionality. *See People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.,* 697 P.2d 348, 370 (Colo. 1985) (system of prior restraint).

Here, the Theaters only argue that the Smoking Ban is unconstitutional as applied to them, and that it should only be invalidated in future similar applications. *See generally People v. Shepard,* 983 P.2d 1, 3 n.3 (Colo. 1999). Thus, they bear the initial burden of making a threshold showing that the Smoking Ban adversely affects their fundamental constitutional rights under the First Amendment and Colorado Constitution article II, section 10.

The Theaters must, therefore, show that smoking in a play is expressive conduct protected by the First Amendment, and that the Smoking Ban incidentally affects this expressive conduct. *See Texas v. Johnson,* 491 U.S. 397, 403 (1989) (as-applied challenge); *Denver Publ'g Co. v. City of Aurora,* 896 P.2d 306, 318-19 (Colo. 1995). The Theaters must "advance more than a mere 'plausible contention' that [their] conduct is expressive." *Church of Am. Knights of Ku Klux Klan v. Kerik,* 356 F.3d 197, 205 (2d Cir. 2004) (citing *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293 n.5 (1984)).

As the Supreme Court explained in *Clark,* 468 U.S. at 293 n.5:

> Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive. In the absence of a showing that such a rule is necessary to protect vital First Amendment interests, we decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it.

Whether the Theaters have made such a threshold showing here is a question of law we review de novo. *Lewis v. Colo. Rockies Baseball Club, Ltd.,* 941

P.2d 266, 271 (Colo. 1997); *Holliday v. Reg'l Transp. Dist.*, 43 P.3d 676, 681 (Colo. App. 2001).

If the Theaters establish that smoking in a play is expressive conduct, the burden then shifts to the state to show that the Smoking Ban "furthers a sufficiently important governmental interest" under *7250 Corp. v. Bd. of County Comm'rs*, 799 P.2d 917, 924 (Colo. 1990), which adopted the four-factor test set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (as-applied challenge). *See Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1283-84 (10th Cir. 2002); *Denver Publ'g Co.*, 896 P.2d at 319.

Courts normally employ two forms of scrutiny when evaluating whether statutes or ordinances violate the First Amendment. Courts subject statutes and ordinances that "suppress, disadvantage, or impose differential burdens upon speech because of its content" to the exacting standard of strict scrutiny to determine their constitutionality. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). To survive this level of scrutiny, the government must show that the law is "supported by a compelling governmental interest and is narrowly drawn to achieve that interest by the least restrictive means possible." *Sanger v. Dennis*, 148 P.3d 404, 415 (Colo. App. 2006).

Content-neutral statutes or ordinances are subject to an intermediate level of scrutiny, "because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad.*, 512 U.S. at 642; *see Ward v.*

Rock Against Racism, 491 U.S. 781, 798 n.6 (1989); *Johnson,* 491 U.S. at 403 ("If the State's regulation [of expressive conduct] is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls."); *Porter v. Bowen,* 496 F.3d 1009, 1021 (9th Cir. 2007).

Thus, we must decide the following issues:

- Whether the Theaters have established that smoking by an actor in the course of a theatrical performance is expressive conduct for the purposes of the First Amendment, and, if so, whether this expressive conduct is incidentally burdened by the Smoking Ban?
- If so, whether the Smoking Ban is content neutral and its constitutionality under the First Amendment is therefore evaluated under the intermediate scrutiny of the four-part *O'Brien* test, as opposed to the more exacting strict scrutiny test?
- If so, whether the Smoking Ban is constitutional for purposes of the First Amendment under the *O'Brien* test?
- If so, because the Colorado Constitution provides greater protection of speech than the First Amendment in certain situations, does the Smoking Ban nevertheless violate Colorado Constitution

> article II, section 10 as applied to these circumstances?

IV. Analysis

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."

Article II, section 10 of the Colorado Constitution states:

> No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

A. First Amendment

1. General Protections of Theatrical Performances

We conclude that the Theaters established that smoking by an actor as part of a theatrical production is expressive conduct for purposes of the First Amendment.

Plays and theatrical productions receive substantial and necessary constitutional protection because of their important communicative content.

> Long before the advent of printing and motion pictures the theater constituted "a significant medium for the communication of ideas" which affected "public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."

Barrows v. Mun. Court, 1 Cal. 3d 821, 824, 464 P.2d 483, 485 (1970) (quoting *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501 (1952)).

"[T]he Constitution protects the right to receive information and ideas." *Stanley v. Georgia,* 394 U.S. 557, 564 (1969).

> A municipal theater is no less a forum for the expression of ideas than is a public park, or a sidewalk; the forms of expression adopted in such a forum may be more expensive and more structured than those typically seen in our parks and streets, but they are surely no less entitled to the shelter of the First Amendment.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 563 (1975) (Douglas, J., concurring) (*Conrad*).

> The nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature. It may be true that First Amendment protections vary in different media, but a musical play must be deemed a unitary form of constitutionally protected expression.

Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. 634, 639 (N.D. Ga. 1971).

"Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Conrad*, 420 U.S. at 557 (majority opinion). Theaters are "public forums designed for and dedicated to expressive activities." *Id.* at 555. "By its nature, theater usually is the acting out – or singing out – of the written word, and frequently mixes speech with live action or conduct." *Id.* at 557-58. However, the Supreme Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376.

2. Expressive Conduct in Theatrical Performances

Conduct can be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)); *see also O'Brien*, 391 U.S. at 376. To determine if conduct is expressive, we look to whether (1) "[a]n intent to convey a particularized message was present" and (2) "the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410-11). Hence, we analyze the

conduct from the perspective of both the actor and the viewer.

"The [*Johnson*] threshold [for the first prong of the test] is not a difficult one, as 'a narrow, succinctly articulable message is not a condition of constitutional protection.'" *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005) (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995)) (concluding a school dress code did not violate the First Amendment under *Johnson*).

To satisfy the second prong, the likelihood must be great that at least *some of* those who viewed the conduct understood there was *some* message, even where a number of viewers did not comprehend its intended point. *Egolf v. Witmer*, 421 F. Supp. 2d 858, 868 (E.D. Pa. 2006).

The Supreme Court has found many instances where conduct falls under First Amendment protections. *E.g.*, *Hurley*, 515 U.S. 557 (marching in a parade); *United States v. Eichman*, 496 U.S. 310 (1990) (burning the flag of the United States); *Cohen v. California*, 403 U.S. 15 (1971) (wearing a jacket displaying vulgar language in protest of war); *Stanley*, 394 U.S. 557 (obtaining or possessing obscene materials in one's home); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (wearing an armband in protest of war); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (saluting the flag or not saluting the flag). These cases provide guidance

as to what constitutes expressive conduct and the protections it is afforded.

Smoking, by itself, is not sufficiently expressive to qualify for First Amendment protection. *See Rohde v. City of Austin,* 124 Fed. Appx. 246 (5th Cir. 2005) (unpublished per curiam); *NYC C.L.A.S.H.*, 315 F. Supp. 2d at 476; *Taverns for Tots, Inc. v. City of Toledo,* 341 F. Supp. 2d 844, 853 (N.D. Ohio 2004). Nevertheless, we are not persuaded by the Health Department's reliance on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704-05 (1986), for the proposition that smoking in the course of a play cannot be expressive conduct. The activity in *Arcara* was prostitution and open sexual conduct. It was not communicative, even from the perspective of the person prosecuted.

Contrary to the Health Department's contention, smoking may be used to give insight into a character's personality, set the mood, or evoke an era. A play might use smoking to communicate specific plot twists, such as a character being diagnosed with cancer after a lifetime of smoking. Smoking could be used to make political statements about smoking itself. *E.g.*, David Cornue, Sam Holtzapple, Warren Loy, 86 Chris Todd, *Smoking Bloomberg* (2006) (Broadway play).

The Theaters list a number of plays that require smoking as critical elements of their performance, including such classics as Edward Albee's *Who's Afraid of Virginia Woolf?*, Jez Butterworth's *Mojo,* John Osborne's *Look Back in Anger,* Julianne

Shepherd's *Buicks,* John Patrick Shanley's *Sailor Song,* Tennessee Williams's *Vieux Carre,* Eugene O'Neill's *A Moon for the Misbegotten,* Harold Pinter's *The Caretaker,* John Pielmeier's *Agnes of God,* Nilo Cruz's *Anna in the Tropics,* and Calder Willingham's *The Graduate.* The Theaters also note the insistence of certain playwrights that their plays be performed exactly as written, and contend the Smoking Ban will preclude them from presenting these plays in Colorado's indoor theaters.

The Theaters maintain that smoking is critical to the plot of their current work, *tempOdyssey,* because the plot entails a character who initially smokes during his life, and later realizes he has died because he can no longer smoke. His inability to inhale or exhale is demonstrated through the act of smoking, and his failed attempts to smoke express a "fundamental, dramatic plot point."

Moreover, the Constitution does not require that the exact intended message be conveyed to every viewer. *Egolf,* 421 F. Supp. 2d at 868. In fact, it is only required that some viewers understand that some message is being conveyed, and they need not agree on the interpretation of the message. *Holloman v. Harland,* 370 F.3d 1252, 1270 (11th Cir. 2004); *see Hurley,* 515 U.S. at 569 (requiring expressions to convey a "particularized message" to each viewer would prevent the "painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll" from First Amendment protections); *White v. City of Sparks,* 500 F.3d 953, 956 (9th Cir. 2007)

(artistic expression accomplishes its aims by "spurring thoughtful reflection in and discussion among its viewers").

We conclude that the Theaters met their initial burden by showing that (1) the act of smoking on stage in the course of a play is expressive conduct, allowing the Theaters to invoke the protections of the First Amendment; and (2) the Smoking Ban places an incidental burden on this expressive conduct by prohibiting it. We must, therefore, next determine whether the Smoking Ban is content based and subject to strict scrutiny, or content neutral and subject to intermediate scrutiny under *O'Brien*.

3. Level of Scrutiny

To determine whether a statute is content neutral, we focus on the legislature's purpose for enacting it. *Ward,* 491 U.S. at 791. If the statute "serves purposes unrelated to the content of expression [it] is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.*

We conclude the Smoking Ban is content neutral because it focuses on the adverse health effects of tobacco smoke, not on expression. It does not address ideas or communication, and does not attempt to regulate speech. There is no indication it was designed to suppress any subject matter, opinion, or concept. It does not express disagreement with any particular message, theatrical or otherwise. *See Hill*

v. Colorado, 530 U.S. 703, 719 (2000); *Am. Life League, Inc. v. Reno,* 47 F.3d 642, 649 (4th Cir. 1995). The Smoking Ban was not intended to prevent actors from expressing emotion, setting a mood, illustrating a character trait, emphasizing a plot twist, or making a political statement. Instead, the Smoking Ban prohibits certain conduct because of its harmful health effects. *See Am. Life League,* 47 F.3d at 652.

Accordingly, we apply the intermediate level of scrutiny prescribed by *O'Brien.* Under that test, we ask whether (1) the statute is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the government's interest in establishing the regulation is unrelated to the suppression of free expression; and (4) the incidental restriction is no greater than is necessary to further that interest. *O'Brien,* 391 U.S. at 381 (finding the nation's "vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances" sufficiently justified prohibiting the burning of selective service cards).

We conclude all four of the *O'Brien* factors were satisfied in this case. *See Denver Publ'g Co.,* 896 P.2d at 319 n.20 (burden of proof is not quantified as preponderance of the evidence or as beyond a reasonable doubt; rather, government must show that "the legislation complies with constitutional requirements").

a. Government's Constitutional Power

The first *O'Brien* factor is satisfied because Colorado's legislature has the authority to enact statutes designed to promote the public health. Colo. Const. art. V, § 1(4) (the General Assembly has the power to "enact any measure"). The government, through its police power, may promulgate ordinances to promote the health, safety, morals, and general welfare of its citizens. *Hill,* 530 U.S. at 715; *City of Erie v. Pap's A.M.,* 529 U.S. 277, 296 (2000); *Slaughter-House Cases,* 83 U.S. at 62; *7250 Corp.,* 799 P.2d at 917 (zoning of nude entertainment establishments); *Eachus v. People,* 124 Colo. 454, 468, 238 P.2d 885, 892 (1951).

b. Important Governmental Interest

The General Assembly declared the purpose of the Smoking Ban to be "to preserve and improve the health, comfort, and environment of the people of this state by limiting exposure to tobacco smoke." § 25-14-202. *Thus,* the Smoking Ban serves an important governmental interest by protecting the health of Colorado's citizens. *Barnes,* 501 U.S. at 582; *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48 (1986) (government's interest in preserving quality of life must be granted high respect); *see Hill v. Thomas,* 973 P.2d 1246, 1258 (Colo. 1999) ("it has long been acknowledged that government 'may properly assert important interests in safeguarding health'" (quoting

Roe v. Wade, 410 U.S. 113, 150 (1973))), *aff'd,* 530 U.S. 703.

The dangers and health care costs attributed to smoking and its effects are well documented. *See generally NYC C.L.A.S.H.,* 315 F. Supp. 2d at 487. We defer to the legislature's determination that the Smoking Ban is needed, because the General Assembly "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here." *See Turner Broad.,* 512 U.S. at 665-66 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 331 n.12 (1985)).

c. Interest Unrelated to Free Expression

We have already concluded that the Smoking Ban is content neutral, because it is justified by health concerns unrelated to expression. Hence, the third *O'Brien* factor has been satisfied. *See Am. Life League,* 47 F.3d at *652; 7250 Corp.,* 799 P.2d at 925 (adult business zoning ordinance focused on preventing "adverse secondary effects" rather than the dissemination of "offensive" speech). The legislature has enacted a statute designed to regulate the adverse health effects of smoke on nonsmokers, and has written it in such as way as to accomplish that goal. *See 7250 Corp., 799* P.2d at 925.

With narrow exceptions not relevant here, the Smoking Ban is applied uniformly to indoor areas

where members of the public may congregate, including public meeting places, courtrooms, hospitals, restaurants, restrooms, libraries, and theaters. § 25-14-204. It applies to everyone in these places.

d. Scope of Incidental Restriction

The fourth prong of *O'Brien* requires that we investigate the breadth of the restriction. "[E]ven regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (quoting *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983)). Regulations on expressive conduct

> must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

Ward, 491 U.S. at 798-99 (footnote omitted) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (employing "time, place, or manner" test to evaluate restrictions on expression in a public forum); *see Barnes*, 501 U.S. at 566 ("time, place, or manner" test and *O'Brien* test "embody much the same standards").

"Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward,* 491 U.S. at 799 (citing *Frisby v. Schultz,* 487 U.S. 474, 485 (1988)).

> So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted.

Ward, 491 U.S. at 800 (quoting *Albertini,* 472 U.S. at 689). The requirement that the means be narrowly tailored is aided where a statute leaves open "ample alternative channels for communication of the information." *Clark,* 468 U.S. at 293; *see also Denver Publ'g* Co., 896 P.2d at 313-16.

We conclude the Smoking Ban is narrowly tailored, because it focuses directly on the one form of conduct, smoking, upon which the state's announced interest in protecting public health depends. *See State v. Ball,* 260 Conn. 275, 294, 796 A.2d 542, 554 (2002) (statute banning interference with hunters narrowly tailored because it only furthered the

government interest prompting the ban, "the actual taking of wildlife").

Further, the Smoking Ban allows other channels of expression, such as outdoor theatrical performances. *See Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 212 (1st Cir. 2002) (restriction on shooting at targets 'depicting human figures at one class of gun clubs allowed ample alternatives because shooters could lawfully fire at targets at other places).

There are alternative channels for expression within indoor theaters. The communication of mood, emotion, attitude, and expression can take various forms. Concepts can be conveyed in different ways, and by different conduct.

Contrary to the Theaters' arguments, reasonable alternatives to smoking real cigarettes and pipes are available. Theater audiences exercise what Samuel Taylor Coleridge called a "willing suspension of disbelief for the moment." Samuel Taylor Coleridge, *Biographia Literaria, in Selected Critical Essays* 28, 29 (T. Raysor ed., 1958). By doing so, the members of the audience allow themselves to experience the play's emotions and messages as if they were real.

But the audience is aware that the scenes are not real. Murders are not committed, actors do not fire live bullets at each other or at the audience, the theater is not set afire to illustrate the burning of Rome in *Julius Caesar*, an actor in a play about the effects of heroin does not inject the drug, and an actor depicting suicide does not hook a hose to the tailpipe

of a running automobile on stage. Rather, these activities are simulated, because, although the First Amendment protects the actor's right to express the ideas of murder, arson, drug use, and suicide, actually murdering, setting conflagrations, ingesting controlled substances, or flooding the theater with carbon monoxide would be illegal and dangerous conduct.

The trial court concluded there were reasonable alternatives to smoking, such as fake and prop cigarettes, that can, and are, being used by theaters in jurisdictions with smoking bans. Although the Theaters view these substitutes as inadequate, they did not demonstrate that the use of substitutes is so inadequate as to outweigh the state's strong interest in protecting the health of its citizens. *See Clark*, 468 U.S. at 293; *Denver Publ'g Co.*, 896 P.2d at 316-18.

The Theaters suggest ways to avoid exposing nonsmokers to involuntary exposure to indoor tobacco smoke, such as providing prior notice to the public that actors will smoke during the production, or by employing ventilation systems. However, the existence of such alternatives does not compel a different result. As the Supreme Court recognized in *Ward*, 491 U.S. at 800, and *Albertini*, 472 U.S. at 689, content-neutral regulations that incidentally burden speech are not invalid simply because an alternative might be less burdensome on speech.

Here, we need not decide whether the legislature reached the best solution in enacting the Smoking

Ban. That is not the court's role. We need only conclude that it was reasonable for the legislature to have determined that preventing involuntary exposure to tobacco smoke is achieved most effectively by banning all smoking in indoor locations, including theaters. *See Ward,* 491 U.S. at 801; *Clark,* 468 U.S. at 297 ("if the parks would be more exposed to harm without the . . . prohibition than with it, the ban is safe from invalidation under the First Amendment"); *Denver Publ'g Co.*, 896 P.2d at 315-16.

We therefore conclude that, although the Smoking Ban is not the least restrictive means, it is narrowly tailored to achieve a legitimate state interest.

For these reasons, we conclude that the Smoking Ban, as applied to the Theaters, does not violate their First Amendment right to freedom of expression.

B. The Colorado Constitution

The Smoking Ban, as applied to the Theaters, must also comport with our state constitution, and we conclude that it does. *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59-60 (Colo. 1991) (collecting cases); *Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d at 356.

In a few instances, the supreme court has recognized the broader scope of the Colorado Constitution in the area of free expression. *E.g., Tattered Cover, Inc. v. City of Thornton,* 44 P.3d 1044, 1056 (Colo. 2002) (concluding the Colorado Constitution required a more substantial justification from the

government than is required by the Fourth Amendment for a search warrant seeking customer purchase records); *Bock*, 819 P.2d at 59-60 (expanding the scope of those private businesses required to permit free speech within their walls beyond those entities described by the United States Supreme Court); *People v. Ford*, 773 P.2d 1059, 1066 (Colo. 1989) (establishing the "tolerance standard" as the proper way to measure which obscene materials are protected by the Colorado Constitution); *Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982, 985 (Colo. 1981) (finding nude dancing constitutes protected expression in Colorado).

However, none of these cases involved a state interest connected with public health, particularly a health concern so damaging and well known. Further, the supreme court has recognized that speech protections may sometimes yield to greater policy interests. *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 606 n.8 (Colo. 1999).

We therefore decline to interpret Colorado Constitution article II, section 10 more expansively than the First Amendment in this context. *See CF&I Steel, L.P. v. United Steel Workers*, 23 P.3d 1197, 1200 (Colo. 2001) (residential picketing arising from labor disputes); *Pierce v. St. Vrain Valley Sch. Dist.*, 981 P.2d at 606 (confidentiality provisions of a settlement agreement); *Colo. Rockies Baseball*, 941 P.2d at 271-72, n.8 (sidewalks as a public forum); *Lorenz v. State*, 928 P.2d 1274, 1285, n.17 (Colo. 1996) (ballot access and right to hold public office; rules of standing);

Denver Publ'g Co., 896 P.2d at 311 (solicitation of occupants in vehicles to buy newspapers); *Parrish v. Lamm*, 758 P.2d 1356, 1365-66 (Colo. 1988) (chiropractors' advertising policy to waive patient obligations to pay deductibles and copayments); *MacGuire v. Houston*, 717 P.2d 948, 954-55 (Colo. 1986) (political affiliation prohibiting ability to serve as an election judge); *Pankratz v. Dist. Court*, 199 Colo. 411, 413-14, 609 P.2d 1101, 1102-03 (1980) (requirement that members of the media comply with subpoenas).

V. Conclusion

The party seeking a preliminary injunction must demonstrate (1) the party has a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury exists that injunctive relief would prevent; (3) the party lacks a plain, speedy, and adequate remedy at law; (4) granting the preliminary injunction would not disserve the public interest; (5) the balance of equities favors granting the injunction; and (6) the injunction will preserve the status quo until a trial upon the merits occurs. C.R.C.P. 65(a); *Rathke*, 648 P.2d at 653-54.

Given our conclusion that the Smoking Ban is a content-neutral statute and is constitutional under the intermediate scrutiny standard established by *O'Brien* as applied to the Theaters, we conclude the trial court did not abuse its discretion in determining that the Theaters did not show they had a reasonable

probability of success on the merits. Accordingly, they were not entitled to a preliminary injunction.

The judgment denying the Theaters' request for a preliminary injunction and declaratory relief is affirmed.

JUDGE ROTHENBERG and JUDGE CARPARELLI concur.

Colorado Revised Statutes, Title 25, Article 14, Part 2

Colorado Clean Indoor Air Act

§ 25-14-201. Short title.

This part 2 shall be known and may be cited as the "Colorado Clean Indoor Air Act".

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§ 25-14-202. Legislative declaration.

The general assembly hereby finds and determines that it is in the best interest of the people of this state to protect nonsmokers from involuntary exposure to environmental tobacco smoke in most indoor areas open to the public, public meetings, food service establishments, and places of employment. The general assembly further finds and determines that a balance should be struck between the health concerns of nonconsumers of tobacco products and the need to minimize unwarranted governmental intrusion into, and regulation of, private spheres of conduct and choice with respect to the use or nonuse of tobacco products in certain designated public areas and in private places. Therefore, the general assembly hereby declares that the purpose of this part 2 is to preserve and improve the health, comfort, and environment of the people of this state by limiting exposure to tobacco smoke.

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§ 25-14-203. Definitions.

As used in this part 2, unless the context otherwise requires:

(1) "Airport smoking concession" means a bar or restaurant, or both, in a public airport with regularly scheduled domestic and international commercial passenger flights, in which bar or restaurant smoking is allowed in a fully enclosed and independently ventilated area by the terms of the concession.

(2) "Auditorium" means the part of a public building where an audience gathers to attend a performance, and includes any corridors, hallways, or lobbies adjacent thereto.

(3) "Bar" means any indoor area that is operated and licensed under article 47 of title 12, C.R.S., primarily for the sale and service of alcohol beverages for on-premises consumption and where the service of food is secondary to the consumption of such beverages.

(4) "Cigar-tobacco bar" means a bar that, in the calendar year ending December 31, 2005, generated at least five percent or more of its total annual gross income or fifty thousand dollars in annual sales from the on-site sale of tobacco products and the rental of on-site humidors, not including any sales from vending machines. In any calendar year after December 31, 2005, a bar that fails to generate at least five percent of its total annual gross income or fifty thousand dollars in annual sales from the on-site sale of

tobacco products and the rental of on-site humidors shall not be defined as a "cigar-tobacco bar" and shall not thereafter be included in the definition regardless of sales figures.

(5)(a) "Employee" means any person who:

(I) Performs any type of work for benefit of another in consideration of direct or indirect wages or profit; or

(II) Provides uncompensated work or services to a business or nonprofit entity.

(b) "Employee" includes every person described in paragraph (a) of this subsection (5), regardless of whether such person is referred to as an employee, contractor, independent contractor, or volunteer or by any other designation or title.

(6) "Employer" means any person, partnership, association, corporation, or nonprofit entity that employs one or more persons. "Employer" includes, without limitation, the legislative, executive, and judicial branches of state government; any county, city and county, city, or town, or instrumentality thereof, or any other political subdivision of the state, special district, authority, commission, or agency; or any other separate corporate instrumentality or unit of state or local government.

(7) "Entryway" means the outside of the front or main doorway leading into a building or facility that is not exempted from this part 2 under section 25-14-205. "Entryway" also includes the area of public or

private property within a specified radius outside of the doorway. The specified radius shall be determined by the local authority or, if the local authority has not acted, the specified radius shall be fifteen feet.

(8) "Environmental tobacco smoke", "ETS", or "secondhand smoke" means the complex mixture formed from the escaping smoke of a burning tobacco product, also known as "sidestream smoke", and smoke exhaled by the smoker.

(9) "Food service establishment" means any indoor area or portion thereof in which the principal business is the sale of food for on-premises consumption. The term includes, without limitation, restaurants, cafeterias, coffee shops, diners, sandwich shops, and short-order cafes.

(10) "Indoor area" means any enclosed area or portion thereof. The opening of windows or doors, or the temporary removal of wall panels, does not convert an indoor area into an outdoor area.

(11) "Local authority" means a county, city and county, city, or town.

(12) "Place of employment" means any indoor area or portion thereof under the control of an employer in which employees of the employer perform services for, or on behalf of, the employer.

(13) "Public building" means any building owned or operated by:

(a) The state, including the legislative, executive, and judicial branches of state government;

(b) Any county, city and county, city, or town, or instrumentality thereof, or any other political subdivision of the state, a special district, an authority, a commission, or an agency; or

(c) Any other separate corporate instrumentality or unit of state or local government.

(14) "Public meeting" means any meeting open to the public pursuant to part 4 of article 6 of title 24, C.R.S., or any other law of this state.

(15) "Smoke-free work area" means an indoor area in a place of employment where smoking is prohibited under this part 2.

(16) "Smoking" means the burning of a lighted cigarette, cigar, pipe, or any other matter or substance that contains tobacco.

(17) "Tobacco" means cigarettes, cigars, cheroots, stogies, and periques; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff and snuff flour; cavendish; plug and twist tobacco; fine-cut and other chewing tobacco; shorts, refuse scraps, clippings, cuttings, and sweepings of tobacco; and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or for smoking in a cigarette, pipe, or otherwise, or both for chewing and smoking. "Tobacco" also includes cloves and any other plant matter or product that is packaged for smoking.

(18) "Tobacco business" means a sole proprietorship, corporation, partnership, or other enterprise engaged primarily in the sale, manufacture, or promotion of tobacco, tobacco products, or smoking devices or accessories, either at wholesale or retail, and in which the sale, manufacture, or promotion of other products is merely incidental.

(19) "Work area" means an area in a place of employment where one or more employees are routinely assigned and perform services for or on behalf of their employer.

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§ 25-14-204. General smoking restrictions.

(1) Except as provided in section 25-14-205, and in order to reduce the levels of exposure to environmental tobacco smoke, smoking shall not be permitted and no person shall smoke in any indoor area, including, but not limited to:

(a) Public meeting places;

(b) Elevators;

(c) Government-owned or -operated means of mass transportation, including, but not limited to, buses, vans, and trains;

(d) Taxicabs and limousines;

(e) Grocery stores;

(f) Gymnasiums;

(g) Jury waiting and deliberation rooms;

(h) Courtrooms;

(i) Child day care facilities;

(j) Health care facilities including hospitals, health care clinics, doctor's offices, and other health care related facilities;

(k)(I) Any place of employment that is not exempted.

(II) In the case of employers who own facilities otherwise exempted from this part 2, each such employer shall provide a smoke-free work area for each employee requesting not to have to breathe environmental tobacco smoke. Every employee shall have a right to work in an area free of environmental tobacco smoke.

(l) Food service establishments;

(m) Bars;

(n) Limited gaming facilities and any other facilities in which any gaming or gambling activity is conducted;

(o) Indoor sports arenas;

(p) Restrooms, lobbies, hallways, and other common areas in public and private buildings, condominiums, and other multiple-unit residential facilities;

(q) Restrooms, lobbies, hallways, and other common areas in hotels and motels, and in at least seventy-five percent of the sleeping quarters within a hotel or motel that are rented to guests;

(r) Bowling alleys;

(s) Billiard or pool halls;

(t) Facilities in which games of chance are conducted;

(u)(I) The common areas of retirement facilities, publicly owned housing facilities, and, except as specified in section 25-14-205(1)(k). nursing homes, but not including any resident's private residential quarters or areas of assisted living facilities specified in section 25-14-205(1)(k).

(II) Nothing in this part 2 affects the validity or enforceability of a contract, whether entered into before, on, or after July 1, 2006, that specifies that a part or all of a facility or home specified in this paragraph (u) is a smoke-free area.

(v) Public buildings;

(w) Auditoria;

(x) Theaters;

(y) Museums;

(z) Libraries;

(aa) To the extent not otherwise provided in section 25-14-103.5, public and nonpublic schools;

(bb) Other educational and vocational institutions; and

(cc) The entryways of all buildings and facilities listed in paragraphs (a) to (bb) of this subsection (1).

(2) A cigar-tobacco bar shall not expand its size or change its location from the size and location in which it existed as of December 31, 2005. A cigar-tobacco bar shall display signage in at least one conspicuous place and at least four inches by six inches in size stating: "Smoking allowed. Children under eighteen years of age must be accompanied by a parent or guardian."

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§ 25-14-205. Exceptions to smoking restrictions.

(1) This part 2 shall not apply to:

(a) Private homes, private residences, and private automobiles; except that this part 2 shall apply if any such home, residence, or vehicle is being used for child care or day care or if a private vehicle is being used for the public transportation of children or as part of health care or day care transportation;

(b) Limousines under private hire;

(c) A hotel or motel room rented to one or more guests if the total percentage of such hotel or motel rooms in such hotel or motel does not exceed twenty-five percent;

(d) Any retail tobacco business;

(e) A cigar-tobacco bar;

(f) An airport smoking concession;

(g) The outdoor area of any business;

(h) A place of employment that is not open to the public and that is under the control of an employer that employs three or fewer employees;

(i) A private, nonresidential building on a farm or ranch, as defined in section 39-1-102, C.R.S., that has annual gross income of less than five hundred thousand dollars; or

(j) Repealed.

(k)(I) The areas of assisted living facilities:

(A) That are designated for smoking for residents;

(B) That are fully enclosed and ventilated; and

(C) To which access is restricted to the residents or their guests.

(II) As used in this paragraph (k), "assisted living facility" means a nursing facility, as that term is defined in section 25.5-4-103, C.R.S., and an assisted living residence, as that term is defined in section 25-27-102.

§ 25-14-206. Optional prohibitions.

(1) The owner or manager of any place not specifically listed in 25-14-204, including a place otherwise exempted under section 25-14-205, may post signs prohibiting smoking or providing smoking and nonsmoking areas. Such posting shall have the effect of including such place, or the designated nonsmoking portion thereof, in the places where smoking is prohibited or restricted pursuant to this part 2.

(2) If the owner or manager of a place not specifically listed in section 25-14-204, including a place otherwise exempted under section 25-14-205, is an employer and receives a request from an employee to create a smoke-free work area as contemplated by section 25-14-204(1)(k)(II), the owner or manager shall post a sign or signs in the smoke-free work area as provided in subsection (1) of this section.

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§ 25-14-207. Other applicable regulations of smoking – local counterpart regulations authorized.

(1) This part 2 shall not be interpreted or construed to permit smoking where it is otherwise restricted by any other applicable law.

(2)(a) A local authority may, pursuant to article 16 of title 31, C.R.S., a municipal home rule charter, or article 15 of title 30, C.R.S., enact, adopt, and enforce smoking regulations that cover the same subject matter as the various provisions of this part 2. No local

authority may adopt any local regulation of smoking that is less stringent than the provisions of this part 2; except that a local authority may specify a radius of less than fifteen feet for the area included within an entryway.

(b) The municipal courts or their equivalent in any city, city and county, or town have jurisdiction over violations of smoking regulations enacted by any city, city and county, or town under this section.

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§ 25-14-208. Unlawful acts – penalty – disposition of fines and surcharges.

(1) It is unlawful for a person who owns, manages, operates, or otherwise controls the use of a premises subject to this part 2 to violate any provision of this part 2.

(2) It is unlawful for a person to smoke in an area where smoking is prohibited pursuant to this part 2.

(3) A person who violates this part 2 is guilty of a class 2 petty offense and, upon conviction thereof, shall be punished by a fine not to exceed two hundred dollars for a first violation within a calendar year, a fine not to exceed three hundred dollars for a second violation within a calendar year, and a fine not to exceed five hundred dollars for each additional violation within a calendar year. Each day of a continuing violation shall be deemed a separate violation.

(4) All judges, clerks of a court of record, or other officers imposing or receiving fines collected pursuant to or as a result of a conviction of any persons for a violation of any provision of this part 2 shall transmit all such moneys so collected in the following manner:

(a) Seventy-five percent of any such fine for a violation occurring within the corporate limits of a city, town, or city and county shall be transmitted to the treasurer or chief financial officer of said city, town, or city and county, and the remaining twenty-five percent shall be transmitted to the state treasurer, who shall credit the same to the general fund.

(b) Seventy-five percent of any fine for a violation occurring outside the corporate limits of a city or town shall be transmitted to the treasurer of the county in which the city or town is located, and the remaining twenty-five percent shall be transmitted to the state treasurer, who shall credit the same to the general fund.

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§ 25-14-209. Severability.

If any provision of this part 2 or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this part 2 that can be given effect without the invalid provision or application, and to this end the provisions of this part 2 are declared to be severable.